(1)

Supreme Court, U.S.
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Supreme Court of the United States

MICHAEL SWAN,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

MICHAEL SWAN
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125 pp

QUESTION PRESENTED FOR REVIEW

1.) Where a federal securities case defendant timely presented substantial, probative evidence and detailed argument that intervening cause and consequential damages constituted significant but unquantified portions of a proposed order for restitution under 18 U.S.C. § 3663, can a federal court decline to order the government to present evidence peculiarly within its power to produce, to negate and/or quantify the evidence of intervening cause and consequential damages, while still preserving the defendant's right to "an adequate opportunity to present information to the court" under U.S.S.G. § 6A1.3?

PARTIES TO THE PROCEEDINGS IN THE COURT BELOW

The following were parties to the proceedings in the United States Court of Appeals for the Ninth Circuit: Petitioner Michael Swan, Keith Shwayder, Kevin Orton, and the United States.

None of the parties is a company, corporation, or subsidiary of any company or corporation.

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OPINIONS BELOW

Michael Swan, the Petitioner herein, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered in the above entitled case on 12-5-02.

The 12-5-02 opinion of the Court of Appeals for the Ninth Circuit, whose judgment is herein sought to be reviewed, is an unpublished decision reported at 2002 U.S. App. LEXIS 25175 and is reprinted in the separate Appendix A to this Petition.

A petition for rehearing was timely filed and was partially granted and partially denied by the Court of Appeals for the Ninth Circuit on 2-24-03. This opinion is a published decision reported at 320 F.3d 889; 2003 U.S. App. LEXIS 3322 and is reprinted in the separate Appendix C to this Petition.

The prior opinion and judgment (Judgment & Commitment Order) of the United States District Court for the District Of Nevada, entered on 3-14-01, is an unpublished decision, and is reprinted in the separate Appendix B to this Petition.

The prior opinion and judgment of the United States District Court for the District Of Nevada, the Judgment & Commitment Order, dated 11-21-01 and amended for clerical error, is an unpublished decision, and is reprinted in the separate Appendix D to this Petition.

The separate opinion and judgment of the United States Court of Appeals for the Ninth Circuit dated 12-5-02 is a published opinion reported at 312 F.3d 1109; 2002 U.S. App. LEXIS 24611 and is reprinted in the separate Appendix E to this Petition.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals was entered on 12-5-02. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, RULES AND REGULATIONS INVOLVED

15 U.S.C. § 78j.

15 U.S.C. § 78ff.

18 U.S.C. § 2.

18 U.S.C. § 371.

18 U.S.C. § 1343.

18 U.S.C. § 1956.

18 U.S.C. § 1962.

18 U.S.C. § 1957.

18 U.S.C. § 3663.

18 U.S.C. § 3664.

U.S.S.G. § 6A1.3

(See Appendix F for text)

STATEMENT OF THE CASE

Petitioner Michael Swan was charged in a superseding indictment with racketeering, RICO conspiracy, conspiracy, securities fraud, wire fraud, and money laundering related to the promotion of common stock of United Payphone Services, Inc. ("UPAY") and Teletek, Inc. to investors. The Court of Appeals found the following facts relevant to this case:

> Keith Shwayder was president of Teletek, Inc. ("Teletek"), a telephone sales and installation company listed on the NASDAQ stock exchange. Michael G. Swan contacted Shwayder about the possibility of merging Teletek with United Payphone ("UPAY"), a telephone company in which Swan had a controlling interest.
>
> UPAY, traded on bulletin boards rather than a major stock exchange, was heavily in debt and in need of cash. Unlike bulletin-board-traded stock, NASDAQ-listed stock can be traded in large volumes, thereby generating substantial amounts of cash. Therefore Swan decided to pursue a merger with Teletek, a NASDAQ-listed company.
>
> Shwayder agreed to merge Teletek with UPAY. In February 1992, Swan purchased a controlling interest in Teletek and became the chief executive and chairman of the Board of Directors of Teletek. Once he acquired Teletek, Swan entered into agreements with stockbrokers. Some of the agreements promised the stockbrokers cash payments by Teletek in exchange for promotion of UPAY and Teletek stock to their customers. Teletek would also issue [*1113] its stock to the stockbrokers under Securities

and Exchange Commission (SEC) [**4] Regulation S-8, which permits stock to be issued in exchange for consulting services. None of the stockbrokers receiving such stock provided consulting services for Teletek or UPAY. Instead, they principally issued and promoted Teletek stock, thereby generating cash for the companies through increased stock sales that in turn drove up the price of Teletek's shares. Shwayder signed several documents filed with the SEC representing that these stock issues were for consulting services.

Shwayder remained involved with Teletek for about nine months after the merger. He then resigned. At about the time that Shwayder left Teletek, Teletek issued stock to Prinfan, a company owned by Shwayder's business associate, Neil Feinstein. According to Shwayder: Feinstein received the stock in exchange for consulting services. Feinstein then loaned money back to Shwayder. Shwayder repaid the loan in part by providing consulting services to Prinfan, and Feinstein forgave the rest. The government's theory was that the consulting agreement with Feinstein, the stock issued to Prinfan, and the loan to Shwayder were all sham transactions designed to pay Shwayder substantial sums to leave Teletek.

For several [**5] years after Shwayder left Teletek, Swan continued paying bribes to induce brokers to sell Teletek stock. Ultimately, the price of Teletek collapsed and the company went bankrupt. Several investors were left with worthless stock or sold their Teletek stock at a significant loss.

United States v. Shwayder, et. al, 312 F.3d 1109; 2002 U.S. App. LEXIS 24611 **3-5 (9th Cir. 2-25-03)

Petitioner Swan was indicted together with codefendants Keith Shwayder and Kevin Orton. He was charged with violations of 18 U.S.C. § 1962(d) (Racketeering Conspiracy) (Count 1); 18 U.S.C. § 1962(c) (Racketeering) (Count 2); 15 U.S.C. § 78j, 15 U.S.C. § 78ff, and 18 U.S.C. § 2 (Aiding & Abetting Securities Fraud) (Counts 3, 5, 7, 9, 11, 13, 15 17, 19, 21, 23, 25 27,29, 31, 33, 35, 37, 39, 41, 43); 18 U.S.C. § 1343 and 18 U.S.C. § 2 (Aiding & Abetting Wire Fraud) (Counts 4, 6, 8, 10, 12, 14, 16, 18, 20, 22, 24, 26, 28, 30, 32, 34, 36, 38, 40, 42, 44); 18 U.S.C. § 1957 and 18 U.S.C. § 2 (Aiding & Abetting Laundering of Monetary Instruments) (Counts 45, 46, 48, 49, 50, 80-88, 93-106); 18 U.S.C. § 1956 and 18 U.S.C. § 2 (Aiding & Abetting Laundering of Monetary Instruments) (Counts 89-92); 18 U.S.C. § 371 (Conspiracy) (Count 107).

Together with codefendants Keith Shwayder and Kevin Orton, Mr. Swan proceeded to trial. After approximately one month of trial, Mr. Swan pleaded guilty to all charges in the indictment.

The plea agreement provided for his testimony on behalf of the government against codefendants Keith Shwayder and Kevin Orton for the remainder of the trial as well as his cooperation in other related matters. He fulfilled his obligations at trial and subsequent to trial. At sentencing, he was granted a downward departure in his sentence of incarceration based on his extensive cooperation.

The amount of restitution was hotly litigated at sentencing. Significant to this petition, are the following uncontested facts.

Prior to Mr. Swan's initial sentencing hearing, counsel reminded the attorney for the government in a hand delivered letter that he and Mr. Swan had been advising them that Mr. Swan's conduct had been, at least in part, a response to an

illegal "naked shorting"[1] conspiracy by third party stockbrokers, wherein these individuals were selling shares of stock in Mr. Swan's company which hadn't been borrowed and/or didn't exist. Counsel pointed out that this naked shorting conspiracy, as a separate and independent factor, an intervening cause, drove the price of the stock downward and caused losses to the investors. Counsel further pointed out that the government had civil and criminal actions against members of the naked shorting conspiracy and, as a result, had unique access to evidence which would reduce the losses attributable to Mr. Swan. Based on the foregoing, counsel formally requested the government to produce exculpatory evidence available to it and in its possession to enable Mr. Swan to mitigate the losses attributable to himself at sentencing. (ER 156-158)[2]

The government declined to produce the evidence.

At Mr. Swan's initial sentencing hearing on 2-16-01, counsel produced competent, probative evidence in the form of the Affidavit of James E. Roth and the testimony of Thomas Joyce, to support his objections to the Presentence Report's recommendation as to the amount of restitution. The affidavit and testimony supported counsel's objections that the recommended amount of restitution included amounts attributable to intervening cause and consequential damages, by detailing personal knowledge that an illegal naked shorting conspiracy had existed and that it had adversely affected the price of Teltek stock. (ER 217) Since neither Joyce nor Mr. Roth had access to the evidence which was peculiarly available to the government (ER 191), they could not specifically quantify the dollar amount of losses to Teltek stock which were attributable to the naked shorting conspiracy. (ER 148-150, 184-185, 191, 218)

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[1] "Naked shorting" is the illegal practice of short selling shares that haven't been borrowed or do not exist at all.

[2] This refers to the "Excerpts of Record", pages 156-158 filed with the Court of Appeals below.

Counsel renewed his request that the government provide Mr. Swan with the evidence from their civil and criminal cases against members of the naked shorting conspiracy, evidence peculiarly available to the government (ER 191), which would quantify -- and reduce -- the losses attributable to Mr. Swan. (ER 161-169, 218)

The government attorney declined to produce the evidence. (ER 169-176, 222)

At the 2-16-01 sentencing hearing, counsel also presented the affidavits of two individuals with personal knowledge of the assets and operations of Teltek. These affidavits provided evidence that Teltek was a viable concern during the time period when Mr. Swan was chief executive and chairman of the Board of Directors of Teletek and also provided competent, probative evidence that mismanagement by members of Teltek, *subsequent to the departure of Mr. Swan from the company*, contributed to the amount of losses to investors attributed to Mr. Swan by the government and in the Presentence Report. (See Affidavits of Joan Green and Leslie Zerman) (ER 151-155, 194)

Sentencing was continued to 3-6-01. At the 3-6-01 hearing, counsel renewed his argument that losses attributable to Mr. Swan had been unlawfully increased by the "illegal naked shorting conspiracy of the Ferraro Brothers" (Transcript 3-6-01, page 147) and by mismanagement by members of Teltek, *subsequent to the departure of Mr. Swan from the company*. (Transcript 3-6-01, pages 147-148) Counsel again moved the court to order the government to produce the evidence peculiarly within the government's power to produce, to enable Mr. Swan to quantify the actual increase in losses that should have been attributed to the illegal naked shorting conspiracy instead of to himself. (Transcript 3-6-01, pages 156-157) Counsel emphasized to the court that, absent the evidence from the government, Mr. Swan's rights were being violated and the proceeding was fundamentally unfair.

The government objected to production of the evidence, arguing, *inter alia*, that it would be too costly to produce this evidence. (Transcript 3-6-01, pages 154-156)

The District Court declined to order the government to produce the evidence with the following finding:

> THE COURT: All right. The specter of shorting not characterized by the government in its representation as naked or illegal shorting, I find that there is no basis to require the government, in meeting its burden of showing loss, to negate the specter of such shorting, that that burden does rest with the defense

(Transcript 3-6-01, page 159)

The District Court did not address Mr. Swan's rights under U.S.S.G. § 6A1.3.

The District Court sentenced Mr. Swan under U.S.S.G. § 3663 to pay $2,546,738.49. In deciding on this sentence, the District Court declined to order the government to present the evidence peculiarly within its power to produce, to negate and/or quantify the evidence of intervening cause and consequential damages, thereby relieving the government of its burden of proof under 18 U.S.C. § 3664(d).

On direct appeal, counsel renewed his argument that Mr. Swan's sentence of restitution under 18 U.S.C. § 3663 unlawfully included amounts attributable to intervening cause and consequential damages and argued that the District Court had impermissibly shifted the burden of proof to Mr. Swan on the restitution issue by failing to require the government to provide evidence negating or quantifying the increase in losses due to the naked shorting conspiracy.

The Court of Appeals, by its order of 12-5-03, affirmed the order of restitution with the following holding:

> **2. Challenges to the Restitution Order.**

A. Acts of Third-Parties: Orton and Swan contend that the district court impermissibly shifted the burden of proof as to the amount of restitution when it did not accept their argument that illegal short selling by third parties was an unrelated, unforeseeable act that actually caused some of the losses for which restitution was ordered. We disagree. Swan and Orton did not make a factual showing on their causation theory so strong that the district court was compelled to accept it in lieu of the government's showing on causation. The defendants did present testimony indicating that some illegal shorting activity may have taken place. But this activity was directly related to the bribery and took place mostly after the time period that the government used to calculate losses. Moreover, Swan admitted that both legal and illegal shorting were foreseeable as a result of his illegal activities and that he reacted to the short selling by bribing more stockbrokers.

Swan and Orton also contend for the first time on appeal that negligent mismanagement subsequent to Swan's departure from Teletek was an unrelated, unforeseeable cause of the losses. Although the defendants rely on evidence [*11] that they presented to the district court for a separate purpose, they never asked the district court to consider this evidence to reduce the amount of the restitution order, even when the district court specifically asked if they had any more arguments regarding causation. Because this argument is very fact-dependent, there are no exceptional circumstances explaining why the issue was not raised below, and since there

> has been no change in law since the proceedings below, we conclude that Swan and Orton waived this argument. See *United States v. Antonakeas*, 255 F.3d 714, 721 (9th Cir. 2001). In any event, we conclude that the evidence is not sufficient to compel a determination of the amount of loss different from that reached by the district court, as it relates to a very minor proportion of the restitution ordered and does not negate any inference that the downward slide in the company's fortunes would have occurred without the new management's asserted errors.
>
> In sum, the district court did not abuse its discretion in accepting the government's proof of losses. We therefore decline to remand to the district court for an evidentiary hearing regarding the causation [*12] for the losses.

United States v. Shwayder, et al., 2002 U.S. App. LEXIS 25175 **10-12 (12-5-02).

Mr. Swan demonstrates within that this Court should grant his Petition For Writ Of Certiorari because the court of appeals for the Ninth Circuit has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

REASONS FOR GRANTING THE WRIT

1.) THIS COURT SHOULD GRANT MR. SWAN'S PETITION FOR WRIT OF CERTIORARI BECAUSE THE COURT OF APPEALS FOR THE NINTH CIRCUIT HAS SO FAR DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS AS TO CALL FOR AN EXERCISE OF THIS COURT'S POWER OF SUPERVISION.

Supreme Court Rule 10 provides in relevant part as follows:

> **Rule 10.**
> **CONSIDERATIONS GOVERNING REVIEW ON WRIT OF CERTIORARI**
>
> A review on writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered:
>
> **(a)** a United States court of appeals has rendered a decision in conflict with the decision of another United States court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial

> proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision... *Id.*

Supreme Court Rule 10(a).

This Court has never hesitated to exercise it's power of supervision where the lower courts have substantially departed from the accepted and usual course of judicial proceedings with resulting injustice to one of the parties. *McNabb v. United States,* 318 U.S. 332 (1943).[3] As the Court stated in *McNabb:*

> ... the scope of our reviewing power over convictions brought here from the federal courts is not confined to ascertainment of Constitutional validity. Judicial supervision of the administration of criminal justice in the federal courts implies the duty of establishing and maintaining civilized standards of procedure and evidence.

McNabb, 318 U.S. at 340.

1A.) Authorities Uniformly Hold That Restitution Under 18 U.S.C. § 3663 Cannot Be Predicated On Loss Attributable To Intervening Cause Or Consequential Damages.

As set forth in the appendix, 18 U.S.C. § 3663(d)(2) provides in relevant part:

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[3] See also *GACA v. United States,* 411 U.S. 618 (1973); *United States v. Jacobs,* 429 U.S. 909 (1976); *Rea v. United States,* 350 U.S. 214 (1956); *Benanti v. United States,* 355 U.S. 96 (1957); *United States v. Behrens,* 375 U.S. 162 (1963); *Elkins v. United States,* 364 U.S. 206 (1960)..

> (2) For the purposes of this section, the term "victim" means a person *directly and proximately harmed* as a result of the commission of an offense for which restitution may be ordered including, in the case of an offense that involves as an element a scheme, conspiracy, or pattern of criminal activity, any person *directly* harmed by the defendant's criminal conduct in the course of the scheme, conspiracy, or pattern...

18 U.S.C. § 3663(d)(2) (emphasis added).

Not surprisingly, the federal courts interpreting and applying this statute have uniformly held that restitution under 18 U.S.C. § 3663 cannot be predicated on loss attributable to intervening cause or consequential damages. *United States v. Silkowski*, 32 F.3d 682, 689 (2nd Cir. 1994) (restitution allowed under 18 U.S.C. § 3663 "for losses that [were] . . . directly caused by the conduct composing the offense of conviction"); *United States v. Schinnell*, 80 F.3d 1064, 1070-71 (5th Cir. 1996) (refused to award accounting costs for reconstructing bank statements in employee embezzlement case); *Gov't of the Virgin Is. v. Davis*, 43 F.3d 41, 45-46 (3rd Cir. 1994) (refusing to award attorneys' fees incurred in effort to recover funds taken from estate through fraud); *United States v. Mullins*, 971 F.2d 1138, 1147 (4th Cir. 1992) (refusing to award investigator's and attorneys' fees from effort to recover equipment taken through fraud); *United States v. Cutter*, 313 F.3d 1; 2002 U.S. App. LEXIS 25156 (1st Cir. 12-10-02) (Restitution is inappropriate if the conduct underlying the conviction is too far removed, either factually or temporally, from the loss; i.e. the government must show not only that a particular loss would not have occurred but for the conduct underlying the offense of conviction, but also that the causal connection between the conduct and the loss is not too attenuated either factually or temporally); *Suez Equity Investors, L.P. v. Toronto-Dominion Bank*, 250 F.3d 87, 96 (2nd Cir. 2001) (loss causation in the

context of securities fraud similar to the tort concept of proximate cause; the court examines how directly the subject of the fraudulent statement caused the loss, and "whether intervening causes are present"); *United States v. Hackett*, 311 F.3d 989; 2002 U.S. App. LEXIS 24106 (9th Cir. 2002) (main inquiry for causation in restitution cases is whether there was an intervening cause, and, if so, whether this "intervening cause" was directly related to the offense conduct); *United States v. Hicks*, 217 F.3d 1038; 2000 U.S. App. LEXIS 13012 (9th Cir. 2000) (same); *United States v. Shepard*, 269 F.3d 884; 2001 U.S. App. LEXIS 22731 (7th Cir. 2001) (18 U.S.C. § 3663 understood to require restitution only for direct losses and not for consequential damages and the other effects that may ripple through the economy); *United States v. Sablan*, 92 F.3d 865 (9th Cir. 1996) (Consequential expenses could not be included in a restitution order); *United States v. Diamond*, 969 F.2d 961, 967-68 (10th Cir. 1992) (holding that expenses generated in recovering a victim's losses were too tangential to the underlying criminal conduct to be recoverable under the VWPA).

In the instant case, it is undisputed that at least *some* of the $2,546,738.49 restitution of which Mr. Swan was ordered to pay included losses predicated on the intervening cause and/or consequential damages created by the naked shorting conspiracy of third parties totally unrelated to Mr. Swan. Every federal court that has considered the question has held that restitution for this type of injury is unlawful under 18 U.S.C. § 3663.

Based on the foregoing law and the facts of Petitioner Swan's case, the lower courts' inclusion of losses predicated on intervening cause and consequential damages, in Mr. Swan's order of restitution under 18 U.S.C. § 3663, so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision

1B.) The Lower Courts Should Have Ordered The Government To Produce Evidence, Peculiarly Within Its Power To Produce To Negate And/Or Quantify The Evidence Of Intervening Cause And Consequential Damages To Preserve Petitioner's Right To "An Adequate Opportunity To Present Information To The Court" Under U.S.S.G. § 6A1.3

The procedure for imposition of a sentence of restitution under 18 U.S.C. § 3663 is governed by the sentencing guidelines to the extent that they are not inconsistent with either 18 U.S.C. § 3663 or 18 U.S.C. § 3664. See U.S.S.G. § 5E1.1; *United States v. Silkowski*, 32 F.3d 682, 689 (2nd Cir. 1994).

18 U.S.C. § 3664 provides in relevant part:

> (e) Any dispute as to the proper amount or type of restitution shall be resolved by the court by the preponderance of the evidence. The burden of demonstrating the amount of the loss sustained by a victim as a result of the offense shall be on the attorney for the Government. The burden of demonstrating the financial resources of the defendant and the financial needs of the defendant's dependents, shall be on the defendant. The burden of demonstrating such other matters as the court deems appropriate shall be upon the party designated by the court as justice requires... *Id.*

18 U.S.C. § 3664(e)

U.S.S.G. § 6A1.3 of the Sentencing Guidelines provides in relevant part:

> Resolution of Disputed Factors (Policy Statement)
>
> (a) When any factor important to the sentencing determination is reasonably in dispute, the parties shall be given an adequate opportunity to present information to the court regarding that factor... *Id.*

U.S.S.G. § 6A1.3

It is well settled law that, under U.S.S.G. § 6A1.3, a federal criminal defendant is entitled to a meaningful opportunity both to contest factors that might enhance his sentence and to offer evidence in support of factors that might warrant a reduced sentence. *United States v. Guerra*, 888 F.2d 247 (2nd Cir. 1988); *United States v. Berzon*, 941 F.2d 8 (1st Cir. 1991); *United States v. Urrego-Linares*, 879 F.2d 1234, 1239 (4th Cir. 1989); *United States v. Palta*, 880 F.2d 636, 640 (2nd Cir. 1989); *United States v. Cervantes*, 878 F.2d 50, 56 (2nd Cir. 1989); *United States v. Markin*, 263 F.3d 491; 2001 U.S. App. LEXIS 18514 (6th Cir. 2001).

In Petitioner Swan's case, as set forth above, The amount of restitution was unfairly litigated.

Prior to Mr. Swan's initial sentencing hearing, counsel reminded the attorney for the government in a hand delivered letter that he and Mr. Swan had been advising them that Mr. Swan's conduct had been, at least in part, a response to an illegal "naked shorting"[4] conspiracy by third party stockbrokers, wherein these individuals were selling shares of stock in Mr. Swan's company which hadn't been borrowed and/or didn't exist. Counsel pointed out that this naked shorting conspiracy, as a separate and independent factor, an intervening cause, drove the price of the stock downward and caused losses to the investors. Counsel further pointed out that the government had civil and criminal actions against members of the naked shorting conspiracy and, as a result,

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[4] "Naked shorting" is the illegal practice of short selling shares that haven't been borrowed or do not exist at all.

had unique access to evidence which would reduce the losses attributable to Mr. Swan. Based on the foregoing, counsel formally requested the government to produce exculpatory evidence available to it and in its possession to enable Mr. Swan to mitigate the losses attributable to himself at sentencing. (ER 156-158)[5]

The government declined to produce the evidence.

At Mr. Swan's initial sentencing hearing on 2-16-01, counsel produced competent, probative evidence in the form of the Affidavit of James E. Roth and the testimony of Thomas Joyce, to support his objections to the Presentence Report's recommendation as to the amount of restitution. The affidavit and testimony supported counsel's objections that the recommended amount of restitution included amounts attributable to intervening cause and consequential damages, by detailing personal knowledge that an illegal naked shorting conspiracy had existed and that it had adversely affected the price of Teltek stock. (ER 217) Since neither Joyce nor Mr. Roth had access to the evidence which was peculiarly available to the government (ER 191), they could not specifically quantify the dollar amount of losses to Teltek stock which were attributable to the naked shorting conspiracy. (ER 148-150, 184-185, 191, 218)

Counsel renewed his request that the government provide Mr. Swan with the evidence from their civil and criminal cases against members of the naked shorting conspiracy, evidence peculiarly available to the government (ER 191), which would quantify -- and reduce -- the losses attributable to Mr. Swan. (ER 161-169, 218)

The government attorney declined to produce the evidence. (ER 169-176, 222)

At the 2-16-01 sentencing hearing, counsel also presented the affidavits of two individuals with personal knowledge of the assets and operations of Teltek. These

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[5] This refers to the "Excerpts of Record", pages 156-158 filed with the Court of Appeals below.

affidavits provided evidence that Teltek was a viable concern during the time period when Mr. Swan was chief executive and chairman of the Board of Directors of Teletek and also provided competent, probative evidence that mismanagement by members of Teltek, *subsequent to the departure of Mr. Swan from the company*, contributed to the amount of losses to investors attributed to Mr. Swan by the government and in the Presentence Report. (See Affidavits of Joan Green and Leslie Zerman) (ER 151-155, 194)

Sentencing was continued to 3-6-01. At the 3-6-01 hearing, counsel renewed his argument that losses attributable to Mr. Swan had been unlawfully increased by the "illegal naked shorting conspiracy of the Ferraro Brothers" (Transcript 3-6-01, page 147) and by mismanagement by members of Teltek, *subsequent to the departure of Mr. Swan from the company*. (Transcript 3-6-01, pages 147-148) Counsel again moved the court to order the government to produce the evidence peculiarly within the government's power to produce, to enable Mr. Swan to quantify the actual increase in losses that should have been attributed to the illegal naked shorting conspiracy instead of to himself. (Transcript 3-6-01, pages 156-157)

The government objected to production of the evidence, arguing, *inter alia*, that it would be too costly to produce this evidence. (Transcript 3-6-01, pages 154-156)

The District Court declined to order the government to produce the evidence with the following finding:

> THE COURT: All right. The specter of shorting not characterized by the government in its representation as naked or illegal shorting, I find that there is no basis to require the government, in meeting its burden of showing loss, to negate the specter of such shorting, that that burden does rest with the defense

(Transcript 3-6-01, page 159)

The District Court did not address Mr. Swan's rights under U.S.S.G. § 6A1.3.

The District Court sentenced Mr. Swan under U.S.S.G. § 3663 to pay $2,546,738.49. In deciding on this sentence, the District Court declined to order the government to present the evidence peculiarly within its power to produce, to negate and/or quantify the evidence of intervening cause and consequential damages, thereby relieving the government of its burden of proof under 18 U.S.C. § 3664(d).

On direct appeal, counsel renewed his argument that Mr. Swan's sentence of restitution under 18 U.S.C. § 3663 unlawfully included amounts attributable to intervening cause and consequential damages and argued that the District Court had impermissibly shifted the burden of proof to Mr. Swan on the restitution issue by failing to require the government to provide evidence negating or quantifying the increase in losses due to the naked shorting conspiracy.

The Court of Appeals, by its order of 12-5-03, affirmed the order of restitution. *United States v. Shwayder, et al.*, 2002 U.S. App. LEXIS 25175 **10-12 (12-5-02).

How much of the $2,546,738.49 restitution was unlawfully placed on Mr. Swan to pay? Only the government knows. It's undisputed that Mr. Swan established that the naked shorting *contributed* to the losses for which he was ordered to pay restitution, but because the government refused to provide the evidence in their possession, Mr. Swan could not *quantify* the amount of the losses. He was never "given an adequate opportunity to present information to the court regarding that factor." Because of his inability to present the information quantifying the losses due to the naked shorting, the District Court declined to reduce his restitution.

Other than the instant lower courts, no federal court has ever held that a defendant received his rights pursuant to U.S.S.G. § 6A1.3 under the facts of this case. The lower courts should have ordered the government to produce

evidence, peculiarly within its power to produce to negate and/or quantify the evidence of intervening cause and consequential damages to preserve petitioner's right to "an adequate opportunity to present information to the court" under U.S.S.G. § 6A1.3

Based on the foregoing, the decision by the Court of Appeals for the Ninth Circuit has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision. *Id. McNabb v. United States,* 318 U.S. 332 (1943); *GACA v. United States,* 411 U.S. 618 (1973); *United States v. Jacobs*, 429 U.S. 909 (1976); *Rea v. United States*, 350 U.S. 214 (1956); *Benanti v. United States,* 355 U.S. 96 (1957); *United States v. Behrens*, 375 U.S. 162 (1963); *Elkins v. United States*, 364 U.S. 206 (1960).

Based on all of the foregoing, this Court should grant certiorari and review the judgment of the Court of Appeals for the Ninth Circuit in Mr. Swan's case.

CONCLUSION

For all of the foregoing reasons, Petitioner Michael Swan respectfully prays that his Petition for Writ of Certiorari be **GRANTED** and the case set for argument on the merits.

Alternatively, Petitioner respectfully prays that this Court **GRANT** certiorari, **VACATE** the order affirming his direct appeal and **REMAND**[6] to the court of appeals for reconsideration in light of U.S.S.G. § 6A1.3.

MICHAEL SWAN
31778-048
C.S. 4500
N. Las Vegas, NV 89036-4500

Date: _____

[6] For authority on "GVR" orders, see *Lawrence v. Chater*, 516 U.S. 163, 167-68, 133 L. Ed. 2d 545, 116 S. Ct. 604 (1996).

No.

Supreme Court of the United States

MICHAEL SWAN,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

APPENDIX

COMES NOW PETITIONER Michael Swan and submits the attached appendix pursuant to Supreme Court Rules.

MICHAEL SWAN
31778-048
C.S. 4500
N. Las Vegas, NV 89036-4500

Date:_____

APPENDIX A

ORDER & JUDGMENT OF THE COURT OF APPEALS FOR THE NINTH CIRCUIT DATED 12-5-02

52 Fed. Appx. 886; 2002 U.S. App. LEXIS 25175, *; 2002 Cal. Daily Op. Service 11727; 2002 Daily Journal DAR 13731

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. KEITH SHWAYDER, MICHAEL G. SWAN, and KEVIN ORTON, Defendants-Appellants.

Nos. 01-10156, 01-10176, 01-10186

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

52 Fed. Appx. 886; 2002 U.S. App. LEXIS 25175; 2002 Cal. Daily Op. Service 11727; 2002 Daily Journal DAR 13731

May 16, 2002, Argued and Submitted, San Francisco, California

December 5, 2002, Filed

NOTICE: [*1] RULES OF THE NINTH CIRCUIT COURT OF APPEALS MAY LIMIT CITATION TO UNPUBLISHED OPINIONS. PLEASE REFER TO THE RULES OF THE UNITED STATES COURT OF APPEALS FOR THIS CIRCUIT.

PRIOR HISTORY: Appeal from the United States District Court for the District of Nevada. D.C. No. CR-96-00288-PMP/RJJ. Philip M. Pro, District Judge, Presiding.

DISPOSITION: AFFIRMED.

COUNSEL: For UNITED STATES OF AMERICA, Plaintiff-Appellee (01-10156): J. Gregory Damm, AUSA, Las Vegas, NV.

For UNITED STATES OF AMERICA, Plaintiff-Appellee (01-10176): J. Gregory Damm, AUSA, U.S. Department of Justice, Las Vegas, NV.

For UNITED STATES OF AMERICA, Plaintiff-Appellee (01-10156, 01-10176): Bruce Bettigole, Esq., United States Attorney, Las Vegas, NV.

For UNITED STATES OF AMERICA, Plaintiff-Appellee (01-10176): David Fry, United States Attorney, Las Vegas, NV.

For UNITED STATES OF AMERICA, Plaintiff-Appellee (01-10186): Kirby Heller, Esq., U.S. Department of Justice, Washington, DC.

For KEITH SHWAYDER, Defendant-Appellant (01-10156): John D. Cline, Freedman, Boyd, Daniels, Hollander, Goldberg & Cline, Albuquerque, NM USA.

For MICHAEL G. SWAN, Defendant-Appellant (01-10176): Dominic P. Gentile, Esq., Attorney at Law, Las [*2] Vegas, NV.

For MICHAEL G. SWAN, Defendant-Appellant (01-10176): Alan Ellis, Esq., LAW OFFICES OF ALAN ELLIS, Sausalito, CA.

For KEVIN ORTON, Defendant-Appellant (01-10186): Douglas P. Mitchell, Esq., Las Vegas, NV.

JUDGES: Before: HUG and BERZON, Circuit Judges, and Lasnik, ** District Judge.

** The Honorable Robert S. Lasnik, United States District Judge for the Western District of Washington, sitting by designation.

OPINION: MEMORANDUM *

----------Footnotes----------

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as may be provided by Ninth Circuit Rule 36-3.

----------End Footnotes----------

Before: HUG and BERZON, Circuit Judges, and Lasnik, ** District Judge.

----------Footnotes----------

** The Honorable Robert S. Lasnik, United States District Judge for the Western District of Washington, sitting by designation.

----------End Footnotes----------

Kevin Orton and [*3] Michael G. Swan were each convicted of racketeering; RICO conspiracy; conspiracy; and multiple counts of securities fraud, wire fraud, and money laundering. Orton appeals his convictions and sentence, and Orton and Swan both challenge the amount of restitution ordered by the district court. We affirm on all issues discussed in this memorandum. n1 Because the parties are familiar with the facts, we recount them here only as necessary to explain our decision.

----------Footnotes----------

n1 In a separate opinion, we resolve the issues in Keith Shwayder's appeal.

----------End Footnotes----------

1. Issues Relating Only to Orton

A. Sufficiency of the Evidence

Orton maintains that he was never aware of the illegal purpose behind the merger, the payments to brokers, or the accounts and ventures that he created at Swan's instruction. Viewing the evidence in the light most favorable to the prosecution, we conclude that a rational trier of fact could have found beyond a reasonable doubt that Orton had the requisite intent to commit the offenses of which he was convicted. [*4] See *Jackson v. Virginia*, 443 U.S. 307, 319, 61 L. Ed. 2d 560, 99 S. Ct. 2781 (1979).

Orton contends that he did not know the illegal purpose of activities involving accounts of various companies that were used to further the fraud scheme. He asserts that he was told by Swan that the 357 Leasing accounts were used for escrow purposes. The government presented testimony, however, that the activity in the 357 Leasing accounts was not consistent with use as an escrow account -- the legitimate explanation that Swan allegedly gave Orton for the accounts. The government also presented evidence of the sudden onset of activity in 357 Leasing during the fraud scheme. The jury could have reasonably inferred that Orton, a trained accountant, would have found such activity questionable.

Further, although Orton testified that he was never an owner of Paramount Securities, the government introduced a document, signed by Orton, establishing that he was the owner. If the jury disbelieved Orton on the ownership issue, it could well have disbelieved everything else he said about Paramount and, more generally, about his knowledge of the other companies' activities.

Orton also maintains [*5] that he did not know that the documents filed with the Securities and Exchange Commission contained false or misleading statements. The allegedly false and misleading information consisted of a

failure to report the payments sent to stockbrokers. Orton was aware that these payments were made, because he usually sent the payments himself. The jury could reasonably have inferred from the fact that the payments were omitted from the reports Orton helped prepare that Orton must have known that the documents contained false or misleading information and that the payments were illegal.

Additionally, Orton testified at trial that he sent large amounts of cash via Federal Express because Teletek's financial problems and history of bouncing checks forced it to deal in cash frequently and that he stopped using cash payments not because a Currency Transaction Report was generated but because he concluded that dealing in cash was impractical and dangerous. The jury could have disbelieved this testimony as inherently implausible, given that the amounts of the relevant individual bank withdrawals were consistently just below the amount that banks are required to report, and that there are obvious [*6] alternatives to sending cash (such as sending certified checks).

Moreover, the jury could also have relied on Orton's testimony regarding his lack of knowledge to support the fact that Orton actually had such knowledge. See *United States v. Stauffer*, 922 F.2d 508, 515 (9th Cir. 1990); *United States v. Kenny*, 645 F.2d 1323, 1346 (9th Cir. 1981) HN1("When the defendant elects to testify, he runs the risk that if disbelieved, the trier of fact may conclude that the opposite of his testimony is the truth."). If the jury found some of Orton's statements entirely implausible, especially given his professional expertise, it could have inferred that he knew the very facts of which he was denying knowledge. The jury was also entitled to discredit Swan's statements denying Orton's knowledge, particularly in light of the fact that Swan was a close friend of Orton. Further, Swan testified at one point that he was sure he told Orton about the bribes in response to the short selling, because he told everyone else. Two

stockbrokers also testified that they had discussed payoff arrangements with Orton.

Given all the evidence, direct and inferential, we cannot conclude [*7] that no rational trier of fact could have found that Orton had the requisite intent to commit the offense for which he was convicted. We therefore affirm his convictions.

B. Guilt-Assuming Hypothetical Questions

Although the prosecution's use of guilt-assuming hypothetical questions to cross-examine Orton's character witnesses constituted error, United States v. Shwayder, No. 01-10156 (opinion filed concurrently), these questions did not affect Orton's substantial rights and therefore do not warrant reversal under the plain error standard. The witnesses' answers were very similar to those provided by Shwayder's character witnesses, and, for similar reasons, were as likely to have aided Orton's cause as to have harmed it.

C. Sentencing Challenges

(i) Grouping of Money Laundering Offenses: The district court properly applied the Sentencing Guidelines' instructions for grouping Orton's convictions under 18 U.S.C. § 1956 with those under § 1957. The court followed the directions in the relevant version of the Guidelines, which instructed that HN2offenses for money laundering, governed by U.S.S.G. § 2S1.1 and 2S1.2, be grouped under [*8] § 3D1.2(d). The Guidelines require offenses listed under § 3D1.2(d) to be grouped according to the method described in § 3D1.3(b). The district court applied this method by first aggregating the total losses associated with the § 1956 and § 1957 violations and then applying the offense guideline -- in this case, § 2S1.1 -- resulting in the highest offense level. *United States v. Savage*, 67 F.3d 1435 (9th Cir. 1995) did not

adopt any contrary interpretation of the Guidelines but, in the course of declining to decide an issue raised on appeal, merely described what one district court had done under the Guidelines' grouping provisions for money laundering offenses.

(ii) Manager or Supervisor Enhancement: The district court did not clearly err by increasing Orton's base offense level three points under U.S.S.G. § 3B1.1(b) for being a manager or supervisor. We need not decide whether Orton directed another criminally responsible participant, see U.S.S.G. § 3B1.1, app. n.1 & 2, because the district court's stated findings support an alternative basis for the enhancement -- that Orton directed the property or assets of the organization. See [*9] U.S.S.G. § 3B1.1, app. n.2. The three-point enhancement rather than the two-point increase was appropriate here both because the organization "involved five or more participants" and because it was "otherwise extensive." U.S.S.G. § 3B1.1, app. n.3.

(iii) *Apprendi* Error: Orton argues that the district judge erred under *Apprendi v. New Jersey*, 530 U.S. 466, 147 L. Ed. 2d 435, 120 S. Ct. 2348 (2000), by making factual findings to increase the base offense level under the Sentencing Guidelines. Orton also contends that the judge's application of the aggregated losses, including the losses associated with his convictions under 18 U.S.C. § 1956, to determine his sentence for convictions under 18 U.S.C. § 1957, constituted a violation of Apprendi. We reject these arguments because HN3"*Apprendi* does not alter the authority of the judge to sentence within the statutory range provided by Congress." *United States v. Buckland*, 289 F.3d 558, 570 (9th Cir. 2002) (en banc); see also *United States v. Johansson*, 249 F.3d 848, 861-62 (9th Cir. 2001).

2. Challenges to the Restitution Order [*10]

A. Acts of Third-Parties: Orton and Swan contend that the district court impermissibly shifted the burden of proof as to the amount of restitution when it did not accept their argument that illegal short selling by third parties was an unrelated, unforeseeable act that actually caused some of the losses for which restitution was ordered. We disagree. Swan and Orton did not make a factual showing on their causation theory so strong that the district court was compelled to accept it in lieu of the government's showing on causation. The defendants did present testimony indicating that some illegal shorting activity may have taken place. But this activity was directly related to the bribery and took place mostly after the time period that the government used to calculate losses. Moreover, Swan admitted that both legal and illegal shorting were foreseeable as a result of his illegal activities and that he reacted to the short selling by bribing more stockbrokers.

Swan and Orton also contend for the first time on appeal that negligent mismanagement subsequent to Swan's departure from Teletek was an unrelated, unforeseeable cause of the losses. Although the defendants rely on evidence [*11] that they presented to the district court for a separate purpose, they never asked the district court to consider this evidence to reduce the amount of the restitution order, even when the district court specifically asked if they had any more arguments regarding causation. Because this argument is very fact-dependent, there are no exceptional circumstances explaining why the issue was not raised below, and since there has been no change in law since the proceedings below, we conclude that Swan and Orton waived this argument. See *United States v. Antonakeas*, 255 F.3d 714, 721 (9th Cir. 2001). In any event, we conclude that the evidence is not sufficient to compel a determination of the amount of loss different from that reached by the district court, as it relates to a very minor proportion of the restitution ordered and does not negate any inference that the downward slide in the

company's fortunes would have occurred without the new management's asserted errors.

In sum, the district court did not abuse its discretion in accepting the government's proof of losses. We therefore decline to remand to the district court for an evidentiary hearing regarding the causation [*12] for the losses.

b. Application of the Restitution Statute: Orton maintains that the district court failed to apply the version of the Victim and Witness Protection Act ("VWPA") in effect at the time he committed the offenses, see 18 U.S.C. §§ 3663, 3664 (1995), and, as a result, did not reduce the amount of restitution to account for other amounts recovered by the victims.

The district court applied the correct version of the VWPA. Although the district court did not explicitly state that it was applying the 1995 version of the VWPA, the Pre-Sentencing Report explained that this version was the applicable statute. Nothing in the district court's application of the restitution statute indicates that it was applying a statute other than the 1995 version.

The district court's judgment ordered that Orton "receive credit for all payments previously made toward any criminal monetary penalties imposed." The district court also instructed that the defendants be jointly and severally liable for the restitution payments. These instructions assured that there would be no duplication of payments. See *United States v. Johnston*, 199 F.3d 1015, 1023 (9th Cir. 1999). [*13]

The district court did not abuse its discretion in failing to use the proceeds collected from a civil settlement to reduce the amount of restitution for which Orton is responsible. HN4The version of the VWPA in effect in 1995 directs that restitution amounts be set off against any amounts later recovered in a civil proceeding but does not require that the

defendant's restitution be reduced by the amount of civil damages recovered. See 18 U.S.C. § 3663(e)(2)(A) (1995); see also *United States v. Savoie*, 985 F.2d 612, 619 (1st Cir. 1993); *United States v. Cloud*, 872 F.2d 846, 854 (9th Cir. 1989).

For the reasons stated above, we AFFIRM Orton's convictions and sentence and the district court's restitution orders as to Orton and Swan.

AFFIRMED.

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APPENDIX B

JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEVADA ENTERED 3-14-01

ENTERED MARCH 14, 2001
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEVADA

JUDGEMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)
UNITED STATES OF AMERICA,
v.
MICHAEL SWAN
Case Number: CR-S-96-288-PMP(RJJ)
Defendant's Attorney: Alan Ellis, Retained
THE DEFENDANT:
[x] pleaded guilty to count(s) 1 through 46, 48 through 50 and 80 through 107 of the Second Superseding Indictment
[] pleaded nolo contendere to count(s)_____ which was accepted by the court.
[] was found guilty on count(s)_____ after a plea of not guilty.

Title & Section: 18 USC 1962(d)
Nature of Offense: racketeering conspiracy
Date Offense Concluded: 12/95
Count Number(s): 1

Title & Section: 18 USC 1962(c), 1963
Nature of Offense: racketeering
Date Offense Concluded: 12/95
Count Number(s): 2

Title & Section: 15 USC 78j(b), 78FF(a) & 18 USC 2
Nature of Offense: securities fraud and aiding and abetting
Date Offense Concluded: 12/95
Count Number(s): 3, 5, 7, 9, 11, 13, 15, 17, 19, 21, 23, 25, 27, 29, 31, 33, 35, 37, 39, 41, 43

The defendant is sentenced as provided in pages 2 through 9 of this judgement. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

[] The defendant has been found not guilty on count(s)_____

[x] Count(s) 47 of Second Superseding, Indictment & Previous Indictments are dismissed on the motion of the United States.

IT IS FURTHER ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant shall notify the court and United States attorney of any material change in the defendant's economic circumstances.

Defendant's Social Security No.: 564-62-0019
Defendant's Date of Birth: 11/12/471947
Date of imposition of Judgement: March 6, 2001
Defendant's USM No.: 31778-048
Defendant's Residence Address: 2654 E. Topaz Square, Las Vegas, NV 89121.
Defendant's Mailing Address: 2654 E. Topaz Square, Las Vegas, NV 89121.

Signature of Judicial Officer
/SS/_____.
Name and Title of Judicial Officer:
PHILIP M. PRO
UNITED STATES DISTRICT JUDGE
Date March 12, 2001

ADDITIONAL COUNTS OF CONVICTION

Title & Section: 18 USC 1343 & 18 USC 2

Nature of Offense: wire fraud and aiding and abetting
Date Offense Concluded: 12/95
Count Number(s): 4, 6, 8, 10, 12, 14, 16, 18, 20, 22, 24, 26, 28, 30, 32, 34, 36, 38, 40, 42, 44

Title & Section: 18 USC 1957 & 18 USC 2
Nature of Offense: laundering of monetary instruments and aiding and abetting
Date Offense Concluded: 12/95
Count Number(s): 45, 46, 48, 49, 50, 80 through 88, 93 through 106

Title & Section: 18 USC 1956 & 18 USC 2
Nature of Offense: laundering of monetary instruments and aiding and abetting
Date Offense Concluded: 04/94
Count Number(s): 89 through 92

Title & Section: 18 USC 371
Nature of Offense: conspiracy
Date Offense Concluded: 12/95
Count Number(s): 107

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of EIGHTY (80) month(s).

EIGHTY MONTHS AS TO COUNTS 1, 2, 3, 5, 7, 9, 11, 13, 15, 17, 19, 21, 23, 25, 27, 31, 33, 35, 37, 39, 41, 43 AND 89 THROUGH 92; SIXTY MONTHS AS TO COUNTS 4, 6, 8, 10, 12, 14, 16, 18, 20, 22, 24, 26, 28, 30, 32, 34, 36, 38, 40, 42, 44 and 107. ALL COUNTS TO RUN CONCURENT TO EACH OTHER.

[x] The Court makes the following recommendations to the Bureau of Prisons:

The court recommends the defendant be incarcerated at FPC Nellis, North Las Vegas, Nevada. The court further recommends the defendant be permitted to participate in the 500 hour drug comprehensive program.

[ ] The defendant is remanded to the custody of the United States Marshal.
[ ] The defendant shall surrender to the United States Marshal for this district
[ ] at _____ [ ] a.m. [ ] p.m. on _____
[ ] as notified by the United States Marshal.
[x] The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:
[x] before 12:00 p.m. Noon Pacific Time on 04/18/01
[ ] as notified by the United States Marshal.
[ ] as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

_____

_____

_____

Defendant delivered on _____ to _____ at _____ with a certified copy of this judgment.

_____
UNITED STATESMARSHAL

By

_____
Deputy U S Marshal

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of THREE (3) YEARS.

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state, or local crime.
The defendant shall not illegally possess a controlled substance.

For offenses committed on or after September 13, 1994:
The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as directed by the probation officer.

[ ] The above drug testing condition is suspended based on the court's determination that the defendant poses a low risk of future substance abuse.

[x] The defendant shall not possess a firearm, destructive device, or any other dangerous weapon.

If this judgment imposes a fine or a restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine or restitution that remains unpaid at the commencement of the term of supervised release in accordance with the Schedule of Payments set forth in the Criminal Monetary Penalties sheet of this judgment.

The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). The defendant shall also comply with the additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without the permission of the Court or probation officer;
2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;
3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
4) the defendant shall support his or her dependents and meet other family responsibilities;
5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or ether acceptable reasons;
6) the defendant shall notify the probation officer ten days prior to any change m residence or employment;
7) the defendant shall refrain from excessive use of alcohol;
8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;
10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;
11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a taw enforcement officer;
12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the Court;
13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make

such notifications and to confirm the defendant's compliance with such notification requirement.

SPECIAL CONDITIONS OF SUPERVISION

1. The defendant shall not possess any illegal controlled substances.

2. The defendant shell not possess, have under his control, or have access to any firearm, explosive device, or other dangerous weapons, as defined by federal, state, or local law.

3. The defendant shall submit to the search of his person, property, residence, automobile under his control by the probation officer, or any other authorized person under the immediate and personal supervision of the probation officer without a search warrant to ensure compliance with all conditions of release

4. The defendant shall provide the probation officer access to any requested financial information, including personal income tax returns, authorization for release of credit information, and any other business financial information in which defendant has a control or interest.

4. The defendant shall not be employed in or consult regarding the sales or promotion or any stocks or securities during the period of supervision.

CRIMINAL MONETARY PENALTIES

The defendant shall pay the following total criminal monetary penalties in accordance with the schedule of payments set forth on Sheet 5. Part B.

Totals: Assessment: $5,300.00

Fine

Restitution: $2,546,738.49 (payable jointly and severally with co-defendants)

[ ] The determination of restitution is deferred until _____. *An Amended Judgement in a Criminal Case* (AO 245C) will be entered after such determination.

[ ] The defendant shall make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 USC § 3664(i), all nonfederal victims must be paid in full prior to the United States receiving payment.

Name of Payee
*Total Amount of Loss
Amount of Restitution Ordered
Priority Order or Percentage of Payment

Totals $_____ $_____

[ ] if applicable, restitution amount ordered pursuant to plea agreement $ _____

[ ] The defendant shall pay interest or any fine or restitution of more than $2,500, unless the fine or restitution is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 USC § 3612(f). All of the payment options on Sheet 5, Part B may be subject to penalties for delinquency and default, pursuant to 18 USC § 3612(g).

[ ] The court determined that the defendant does not have the ability to pay interest, and it is ordered that:

[ ] the interest requirement is waived for the [ ] fine and/or [ ] restitution.

[ ] the interest requirement for the [ ] fine and/or [ ] restitution is modified as follows:

* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of the Title 18, United States Code, for offenses committed on or after September 13, 1994 but before April 23, 1996.

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties shall be due as follows:

A [ ] Lump sum payment of $ _____ due immediately, balance due

[ ] not later than _____; or

[ ] in accordance with [ ] C, [ ] D, or [ ] E below; or

B [ ] Payment to begin immediately (may be combined with [ ] C, [ ] D, or [ ] E below); or

C [ ] Payment in _____ (e.g., equal, weekly, monthly, quarterly) installments of $ _____ over a period of _____ (e.g., months or years), to commence _____(e.g., 30 or 60 days) after the date of this judgment; or

D [ ] Payment in _____ (e.g., equal, weekly, monthly, quarterly) installments of $ _____ over a period of _____ (e.g., months or years), to commence _____(e.g., 30 or 60 days) after release from imprisonment to a term of supervision; or

E X Special instructions regarding the payment of criminal penalties:

The special assessment of $5,300.00 is due and payable immediately.

The restitution amount of $2,546,738.49 is payable at the rate of 30% of defendant's prison earnings and thereafter at the rate of $800.00 per month while on supervised released, subject to adjustment based on ability to pay. The restitution amount is payable jointly and severally with co-defendants.

Unless the court has expressly ordered otherwise in the special instructions above, if this judgment imposes a period of imprisonment, payment of criminal monetary penalties shall be due during the period of imprisonment. All criminal monetary penalty payments, except those payments made

through the Bureau of Prison's Inmate Financial Responsibility Program, are to be made as directed by the Court, the probation officer, or the United States Attorney.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

[ ] Joint and Several
Defendant Name, Case Number, and Joint and Several Amount:

[ ] The defendant shall pay the cost of prosecution.
[ ] The defendant shall pay the following court cost(s):
[ ] The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) community restitution, (6) fine interest, (7) penalties, and (8) costs, including cost of prosecution and court costs.

STATEMENT OF REASONS

The Court adopts the factual findings and guideline application in the presentence report.

OR

The Court adopts the factual findings and guideline application in the presentence report except (see attachment, if necessary):
SEE TRANSCRIPT

Guideline Range Determined by the Court:
Total Offense Level: 27
Criminal History Category: 1
Imprisonment Range: 70 to 87 months.
Supervised Release Range: 2 to 3 years.

Fine Range: $12,500.00 to $125,000.00

[ ] Fine waived or below the guideline range because of inability to pay.
Amount of Restitution: $2,546,738.49 (payable jointly and severally with co-defendants)

[ ] Discretionary restitution is not ordered because the complication and prolongation of the sentencing process resulting from the fashioning of a restitution order outweighs the need to provide restitution to any victims, pursuant to 18 USC. § 3663(a)(B)(ii) (or the offenses committed before April 23, 1996, pursuant to 18 USC § 3663(d).

[ ] Restitution pursuant to the mandatory victim restriction provisions is nor ordered in this title 18 property offense because the number of identifiable victims is so large as to make restitution impracticable, pursuant to 18 USC § 3663A(c)(3)(A).

[ ] Restitution pursuant to the mandatory victim restriction provisions is nor ordered in this title 18 property offense because determining complex issues of fact related to the cause of amount of the victim's losses would complicate or prolong the sentencing process to a degree that the need to provide restitution to any victim is overweighed by the burden on the sentencing process, pursuant to 18 USC § 3663A(c)(3)(A).

[ ] For offenses committed on or after September 13, 1994 but before April 23, 1996 that require the total amount of loss to be stated, pursuant to Chapters 1DgA, 110, 110A, 113A of Title 18, restitution is not ordered because the economic circumstances of the defendant do not allow for the payment of any amount of a restitution order, and do not allow for the payment of any or some portion of a restitution order in the

foreseeable future under any reasonable schedule of payments.

[ ] Partial restitution is ordered, pursuant to 18 USC 3553(c) for the following reason(s):

STATEMENT OF REASONS

[ ] The sentence is within the guideline range, that range does not exceed 24 months, and the court finds no reason to depart from the sentence called for by the application of the guidelines

[ ] The sentence is within the guideline, range, that range exceeds 24 months, and the sentence is imposed for the following reason(s):
OR
[x] The sentence departs from the guideline range:
X upon motion of the government, as a result of defendant's substantial assistance.
[ ] for the following specific reason(s):
SEE TRANSCRIPT

APPENDIX C

ORDER OF THE COURT OF APPEALS
FOR THE NINTH CIRCUIT
DATED 2-24-03

320 F.3d 889, *; 2003 U.S. App. LEXIS 3322, **;
2003 Daily Journal DAR 1978

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. KEITH SHWAYDER, MICHAEL G. - SWAN, and KEVIN ORTON, Defendants-Appellants.

Nos. 01-10156, 01-10176, 01-10186

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

320 F.3d 889; 2003 U.S. App. LEXIS 3322; 2003 Daily Journal DAR 1978

February 24, 2003, Filed

PRIOR HISTORY: [*1] Appeal from the United States District Court for the District of Nevada. D.C. No. CR-96-00288-PMP/RJJ. Philip M. Pro, District Judge, Presiding.

United States v. Shwayder, 312 F.3d 1109, 2002 U.S. App. LEXIS 24611 (9th Cir. Nev. 2002).

OPINION: ORDER

The opinion of this court in the above-captioned case issued December 5, 2002, is amended as follows:

Slip Op. page 19, lines 11-23, change:

"There was one fact not available from an independent source--that Swan had lied to Schlie during his prior representation. It is difficult, however, to characterize Schlie's failure to mention this fact as an adverse effect caused by his former representation of Swan. Schlie would never have known that Swan lied to his former lawyer if he had not been that lawyer. As no other lawyer could have cross-examined Swan on that point, Schlie's representation was no different as to that point than it would have been without the conflict.

In any event, the omission regarding Swan's lies to Schlie had at most a negligible effect. Schlie emphasized in closing that Swan had lied to everyone else, specifically mentioning "his lawyer," as well as Shwayder."

to

"There was one fact not available from an independent source -- that Swan had lied to Schlie during his prior representation. [*2] It is impossible, however, to characterize Schlie's failure to mention this fact as an adverse effect caused by his former representation of Swan. Schlie's communications with Swan were protected by the attorney-client privilege, so they could not have been elicited by any other lawyer either. Schlie did, nevertheless, emphasize in closing that Swan had lied to everyone else, specifically mentioning "his [other] lawyer," as well as Shwayder."

* * * * * *

With these amendments, the panel has unanimously voted to deny appellant's petition for rehearing. Judge Berzon has voted to deny the petition for rehearing en banc. Judges Hug and Lasnik recommend denial of the petition for rehearing en banc.

The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing is denied and the petition for rehearing en banc is denied.

Appellant's motion for leave to file a reply in support of the petition for rehearing is denied as moot.

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C 3

APPENDIX D

AMENDED USDC JUDGMENT
DATED 11-21-01

ENTERED NOVEMBER 21, 2001
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEVADA

JUDGEMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)
UNITED STATES OF AMERICA,

v.

MICHAEL SWAN

Case Number: CR-S-96-288-PMP(RJJ)

Defendant's Attorney: Alan Ellis, Retained

Reason for Amendment:

[ ] Correction of Sentence on Remand (Fed. R. Crim. P.35(a))

[ ] Reduction of Sentence for Changed Circumstances (Fed. R. Crim. P.35(b))

[ ] Correction of Sentence by Sentencing Court (Fed. R. Crim. P.

X Correction of Sentence for Clerical Mistake (Fed. R. Crim. P.36)

[ ] Modification of Supervision Conditions (18 USC § 3563(c) or 3538(e))

[ ] Modification of Imposed Term of Imprisonment for Extraordinary and Compelling Reasons (18 USC § 3582(c)(1))

[ ] Modification of Imposed Term of Imprisonment for Retroactive Amendment(s) to the Sentencing Guidelines (18 USC § 3582(c)(2))

[ ] Direct Motion to District Court Pursuant to [ ] 28 USC § 2255 or [ ] 18 USC § 3559(c)(7)

[ ] Modification of Restitution Order (18 USC § 3664)

THE DEFENDANT:

[x] pleaded guilty to count(s) 1 through 46, 48 through 50 and 80 through 107 of the Second Superseding Indictment

[] pleaded nolo contendere to count(s)_____ which was accepted by the court.

[] was found guilty on count(s)_____
after a plea of not guilty.

Title & Section: 18 USC 1962(d)
Nature of Offense: racketeering conspiracy
Date Offense Concluded: 12/95
Count Number(s): 1

Title & Section: 18 USC 1962(c), 1963
Nature of Offense: racketeering
Date Offense Concluded: 12/95
Count Number(s): 2

Title & Section: 15 USC 78j(b), 78FF(a) & 18 USC 2
Nature of Offense: securities fraud and aiding and abetting
Date Offense Concluded: 12/95
Count Number(s): 3, 5, 7, 9, 11, 13, 15, 17, 19, 21, 23, 25, 27, 29, 31, 33, 35
The defendant is sentenced as provided in pages 2 through 9 of this judgement. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.
[] The defendant has been found not guilty on count(s)_____
[x] Count(s) 47 of Second Superseding, Indictment & Previous Indictments are dismissed on the motion of the United States.

IT IS FURTHER ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant shall notify the court and United States attorney of any material change in the defendant's economic circumstances.

Defendant's Social Security No.: 564-62-0019
Defendant's Date of Birth: 11/12/471947
Date of imposition of Judgement: November 14, 2001
Defendant's USM No.: 31778-048
Defendant's Residence Address: 2654 E. Topaz Square, Las Vegas, NV 89121.
Defendant's Mailing Address: 2654 E. Topaz Square, Las Vegas, NV 89121.

Signature of Judicial Officer
/SS/
Name and Title of Judicial Officer:
PHILIP M. PRO
UNITED STATES DISTRICT JUDGE
Date March 21, 2001

DEFENDANT: MICHAEL G. SWAN
CASE NUMBER: CR-S-96-288-PMP(RJJ)

ADDITIONAL COUNTS OF CONVICTION

Title & Section: 15 USC 78j(b), 78ff(a) & 18 USC 2
Nature of Offense: securities fraud and aiding and abetting
Date Offense Concluded: 12/95
Count Number(s): 37, 39, 41, 43

Title & Section: 18 USC 1343 & 18 USC 2
Nature of Offense: wire fraud and aiding and abetting
Date Offense Concluded: 12/95
Count Number(s): 4, 6, 8, 10, 12, 14, 16, 18, 20, 22, 24, 26, 28, 30, 32, 34, 36, 38, 40, 42, 44

Title & Section: 18 USC 1957 & 18 USC 2
Nature of Offense: laundering of monetary instruments and aiding and abetting
Date Offense Concluded: 12/95
Count Number(s): 45, 46, 48, 49, 50, 80 through 88, 93 through 106

Title & Section: 18 USC 1956 & 18 USC 2
Nature of Offense: laundering of monetary instruments and aiding and abetting
Date Offense Concluded: 04/94
Count Number(s): 89 through 92

Title & Section: 18 USC 371
Nature of Offense: conspiracy
Date Offense Concluded: 12/95
Count Number(s): 107

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of EIGHTY (80) month(s).

EIGHTY MONTHS AS TO COUNTS 1, 2, 3, 5, 7, 9, 11, 13, 15, 17, 19, 21, 23, 25, 27, 31, 33, 35, 37, 39, 41, 43, 50 AND 80 THROUGH 106; SIXTY MONTHS AS TO COUNTS 4, 6, 8, 10, 12, 14, 16, 18, 20, 22, 24, 26, 28, 30, 32, 34, 36, 38, 40, 42, 44 and 107. ALL COUNTS TO RUN CONCURENT TO EACH OTHER.

[x] The Court makes the following recommendations to the Bureau of Prisons:

The court recommends the defendant be incarcerated at FPC Nellis, North Las Vegas, Nevada. The court further recommends the defendant be permitted to participate in the 500 hour drug comprehensive program.

[ ] The defendant is remanded to the custody of the United States Marshal.
[ ] The defendant shall surrender to the United States Marshal for this district
[ ] at _____ [ ] a.m. [ ] p.m. on _____

[ ] as notified by the United States Marshal.

[x] The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

[x] before 12:00 p.m. Noon Pacific Time on 04/18/01

[ ] as notified by the United States Marshal.

[ ] as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

_____

_____

_____

Defendant delivered on _____ to _____ at _____ with a certified copy of this judgment.

_____

UNITED STATESMARSHAL

By

_____

Deputy U S Marshal

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of THREE (3) YEARS.

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state, or local crime.

The defendant shall not illegally possess a controlled substance.

For offenses committed on or after September 13, 1994:

The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug

test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as directed by the probation officer.

[ ] The above drug testing condition is suspended based on the court's determination that the defendant poses a low risk of future substance abuse.

[x] The defendant shall not possess a firearm, destructive device, or any other dangerous weapon.

If this judgment imposes a fine or a restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine or restitution that remains unpaid at the commencement of the term of supervised release in accordance with the Schedule of Payments set forth in the Criminal Monetary Penalties sheet of this judgment.

The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). The defendant shall also comply with the additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without the permission of the Court or probation officer;
2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;
3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
4) the defendant shall support his or her dependents and meet other family responsibilities;
5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or ether acceptable reasons;

6) the defendant shall notify the probation officer ten days prior to any change m residence or employment;
7) the defendant shall refrain from excessive use of alcohol;
8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;
10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;
11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a taw enforcement officer;
12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the Court;
13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

SPECIAL CONDITIONS OF SUPERVISION

1. The defendant shall not possess any illegal controlled substances.

2. The defendant shell not possess, have under his control, or have access to any firearm, explosive device, or other dangerous weapons, as defined by federal, state, or local law.

3. The defendant shall submit to the search of his person, property, residence, automobile under his control by the probation officer, or any other authorized person under the immediate and personal supervision of the probation officer without a search warrant to ensure compliance with all conditions of release.

4. The defendant shall provide the probation officer access to any requested financial information, including personal income tax returns, authorization for release of credit information, and any other business financial information in which defendant has a control or interest.

4. The defendant shall not be employed in or consult regarding the sales or promotion or any stocks or securities during the period of supervision.

CRIMINAL MONETARY PENALTIES

The defendant shall pay the following total criminal monetary penalties in accordance with the schedule of payments set forth on Sheet 5. Part B.

Totals: Assessment: $5,300.00

Fine

Restitution: $2,546,738.49 (payable jointly and severally with co-defendants)

[ ] The determination of restitution is deferred until _____. *An Amended Judgement in a Criminal Case* (AO 245C) will be entered after such determination.

[ ] The defendant shall make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 USC §

3664(i), all nonfederal victims must be paid in full prior to the United States receiving payment.

Name of Payee
*Total Amount of Loss
Amount of Restitution Ordered
Priority Order or Percentage of Payment

Totals $_____ $_____

[ ] if applicable, restitution amount ordered pursuant to plea agreement $ _____
[ ] The defendant shall pay interest or any fine or restitution of more than $2,500, unless the fine or restitution is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 USC § 3612(f). All of the payment options on Sheet 5, Part B may be subject to penalties for delinquency and default, pursuant to 18 USC § 3612(g).
[ ] The court determined that the defendant does not have the ability to pay interest, and it is ordered that:
[ ] the interest requirement is waived for the [ ] fine and/or [ ] restitution.
[ ] the interest requirement for the [ ] fine and/or [ ] restitution is modified as follows:

* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of the Title 18, United States Code, for offenses committed on or after September 13, 1994 but before April 23, 1996.

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties shall be due as follows:
A [ ] Lump sum payment of $ _____ due immediately, balance due
[ ] not later than _____; or
[ ] in accordance with [ ] C, [ ] D, or [ ] E below; or

B [ ] Payment to begin immediately (may be combined with [ ] C, [ ] D, or [ ] E below); or
C [ ] Payment in _____ (e.g., equal, weekly, monthly, quarterly) installments of $ _____ over a period of _____ (e.g., months or years), to commence _____(e.g., 30 or 60 days) after the date of this judgment; or
D [ ] Payment in _____ (e.g., equal, weekly, monthly, quarterly) installments of $ _____ over a period of _____ (e.g., months or years), to commence _____(e.g., 30 or 60 days) after release from imprisonment to a term of supervision; or
E X Special instructions regarding the payment of criminal penalties:
The special assessment of $5,300.00 is due and payable immediately.
The restitution amount of $2,546,738.49 is payable at the rate of 30% of defendant's prison earnings and thereafter at the rate of $800.00 per month while on supervised released, subject to adjustment based on ability to pay. The restitution amount is payable jointly and severally with co-defendants.
Unless the court has expressly ordered otherwise in the special instructions above, if this judgment imposes a period of imprisonment, payment of criminal monetary penalties shall be due during the period of imprisonment. All criminal monetary penalty payments, except those payments made through the Bureau of Prison's Inmate Financial Responsibility Program, are to be made as directed by the Court, the probation officer, or the United States Attorney.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

[ ] Joint and Several
Defendant Name, Case Number, and Joint and Several Amount:

[ ] The defendant shall pay the cost of prosecution.
[ ] The defendant shall pay the following court cost(s):
[ ] The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) community restitution, (6) fine interest, (7) penalties, and (8) costs, including cost of prosecution and court costs.

STATEMENT OF REASONS

The Court adopts the factual findings and guideline application in the presentence report.

OR

The Court adopts the factual findings and guideline application in the presentence report except (see attachment, if necessary):
SEE TRANSCRIPT

Guideline Range Determined by the Court:
Total Offense Level: 27
Criminal History Category: 1
Imprisonment Range: 70 to 87 months.
Supervised Release Range: 2 to 3 years.
Fine Range: $12,500.00 to $125,000.00

[ ] Fine waived or below the guideline range because of inability to pay.
Total Amount of Restitution: $2,546,738.49 (payable jointly and severally with co-defendants)

[ ] Discretionary restitution is not ordered because the complication and prolongation of the sentencing process resulting from the fashioning of a restitution order outweighs the need to provide restitution to any victims, pursuant to 18

USC. § 3663(a)(B)(ii) (or the offenses committed before April 23, 1996, pursuant to 18 USC § 3663(d).

[ ] Restitution pursuant to the mandatory victim restriction provisions is nor ordered in this title 18 property offense because the number of identifiable victims is so large as to make restitution impracticable, pursuant to 18 USC § 3663A(c)(3)(A).

[ ] Restitution pursuant to the mandatory victim restriction provisions is nor ordered in this title 18 property offense because determining complex issues of fact related to the cause of amount of the victim's losses would complicate or prolong the sentencing process to a degree that the need to provide restitution to any victim is overweighed by the burden on the sentencing process, pursuant to 18 USC § 3663A(c)(3)(A).

[ ] For offenses committed on or after September 13, 1994 but before April 23, 1996 that require the total amount of loss to be stated, pursuant to Chapters 1DgA, 110, 110A, 113A of Title 18, restitution is not ordered because the economic circumstances of the defendant do not allow for the payment of any amount of a restitution order, and do not allow for the payment of any or some portion of a restitution order in the foreseeable future under any reasonable schedule of payments.

[ ] Partial restitution is ordered, pursuant to 18 USC 3553(c) for the following reason(s):

STATEMENT OF REASONS

[ ] The sentence is within the guideline range, that range does not exceed 24 months, and the court finds no reason to depart from the sentence called for by the application of the guidelines

[ ] The sentence is within the guideline, range, that range exceeds 24 months, and the sentence is imposed for the following reason(s):

OR

[x] The sentence departs from the guideline range:
X upon motion of the government, as a result of defendant's substantial assistance.
[ ] for the following specific reason(s):
SEE TRANSCRIPT

I hereby attest and certify on 11/21/01
that the foregoing document is full,
true and correct copy of original on file
in my office, and in my legal custody.
CLERK, U.S. DISTRICT COURT
DISTRICT OF NEVADA
By _____ Deputy

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

UNITED STATES OF AMERICA,)
Plaintiff,)
vs.)
MICHAEL SWAN,)
Defendants.)

CR-S-96-288-PMP(RJJ)
MINUTES OF THE COURT
DATED: November 14, 2001

Present: the Honorable Philip M. Pro, United States District Judge
Deputy Clerk: Donna Andrews Recorder: Judy Watson
Counsel for Plaintiff: Bruce M. Bettigole, J. Gregory Damm

Counsel for Defendant: Alan Ellis, Retained
U.S. Probation Officer: Ward Travis
Also present: Eileen Guillermo, Case Worker

PROCEEDINGS: HEARING RE AMENDED JUDGMENT

2: 30 p.m. Court convenes. Mr. Bettigole and Mr. Ellis are present telephonically. The defendant and his case worker. Ms. Guillermo, are also present telephonically.

The Court advises the parties on March 6, 2001, the Court imposed sentence in Mr. Swan's case. In that Judgment at page two, there is reference to various counts of conviction in counts 45, 46, 48, 49, 50, 80 through 88 and 93 through 106. However, when the Court announced the sentence of eighty months as to certain counts of conviction, the Court did not reference those counts. The Court was reading from the Presentence Report at the time of sentence, however, there had been a similar omission of those counts from that report. While it doesn't affect the sentence, those counts were not accounted for at the time of sentencing. Ms. Guillermo, the case worker at Nellis, contacted the Court's clerk to notify her of the omission of the counts.

Mr. Travis apologizes on behalf of the Probation Office for omitting that group of counts from the Presentence Report.

The Court advises counsel it would be the Court's intent to enter an Amended Judgment accounting for those counts, which would not impose any additional time on Mr. Swan's sentence.

Mr. Ellis and Mr. Bettigole state they have no objection to an Amended Judgment being entered by the Court to include those counts.

IT IS ORDERED the clerk shall enter an Amended Judgment to include those counts which were omitted from the Original Judgment entered on March 6, 2001.

2:40 p.m. Court adjourns.

LANCE S. WILSON, CLERK
United States District Court
By: _____

Deputy Clerk

APPENDIX E

USCA OPINION
DATED 12-5-02 (As Amended 2-24-03)

312 F.3d 1109, *; 2002 U.S. App. LEXIS 24611, **; 60 Fed. R. Evid. Serv. (Callaghan) 28; 2002 Cal. Daily Op. Service 11727

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. KEITH SHWAYDER, MICHAEL G. SWAN, and KEVIN ORTON, Defendants-Appellants.

Nos. 01-10156, 01-10176, 01-10186

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

312 F.3d 1109; 2002 U.S. App. LEXIS 24611; 60 Fed. R. Evid. Serv. (Callaghan) 28; 2002 Cal. Daily Op. Service 11727; 2002 Daily Journal DAR 13731

May 16, 2002, Argued and Submitted, San Francisco, California

December 5, 2002, Filed

PRIOR HISTORY: Appeal from the United States District Court for the District of Nevada. D.C. No. CR-96-00288-PMP/RJJ. Philip M. Pro, District Judge, Presiding.

United States v. Shwayder, 312 F.3d 1109, 2002 U.S. App. LEXIS 24611, 2002 C.D.O.S. 11727 (9th Cir. Nev. 2002).

DISPOSITION: Affirmed.

COUNSEL: John D. Cline, Freedman, Boyd, Daniels, Hollander, Gold-berg & Cline P.A., Albuquerque, New Mexico; Alan Ellis and Karen Landau, Law Offices of Alan Ellis, Sausalito, California; Douglass A. Mitchell, Dickerson, Dickerson, Consul & Pocker, Las Vegas, Nevada, for the defendant-appellants.

J. Gregory Damm and Bruce M. Bettigole, Office of the United States Attorney, Las Vegas, Nevada, and Kirby A. Heller, Appellate Section, Criminal Division, United States

Department of Justice, Washington, D.C., for the plaintiff-appellee.
JUDGES: Before: Procter Hug, Jr. and Marsha S. Berzon, Circuit Judges, and Robert S. Lasnik, * District Judge. Opinion by Judge Berzon.

* The Honorable Robert S. Lasnik, United States District Judge for the Western District of Washington, sitting by designation.

OPINIONBY: Marsha S. Berzon
OPINION:

BERZON, Circuit Judge:

Keith Shwayder appeals his convictions for racketeering, RICO conspiracy, conspiracy, securities fraud, wire fraud, and money laundering. He argues [*2] that he was deprived of his Sixth Amendment right to effective assistance of counsel because his trial counsel had an actual conflict of interest. Although there was such a conflict, Shwayder has not shown that the conflict adversely affected his counsel's representation.

Shwayder further contends that the prosecution asked his character witnesses guilt-assuming hypothetical questions, in violation of his right to due process. The prosecution's use of guilt-assuming hypothetical questions did constitute error, but this error did not affect Shwayder's substantial rights.

Lastly, Shwayder contends that the factual findings used to increase his base offense level for sentencing purposes should have been made by a jury rather than a judge. The law of this circuit is to the contrary.

Because none of these contentions warrants reversal or remand, we affirm Shwayder's convictions and sentence. n1

----------Footnotes----------

n1 We are simultaneously filing a memorandum disposition addressing matters concerning co-defendants Orton and Swan in Nos. 01-10176 and 01-10186.

----------End Footnotes----------

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I. BACKGROUND

A. The Conspiracy

Keith Shwayder was president of Teletek, Inc. ("Teletek"), a telephone sales and installation company listed on the NASDAQ stock exchange. Michael G. Swan contacted Shwayder about the possibility of merging Teletek with United Pay-phone ("UPAY"), a telephone company in which Swan had a controlling interest.

UPAY, traded on bulletin boards rather than a major stock exchange, was heavily in debt and in need of cash. Unlike bulletin-board-traded stock, NASDAQ-listed stock can be traded in large volumes, thereby generating substantial amounts of cash. Therefore Swan decided to pursue a merger with Teletek, a NASDAQ-listed company.

Shwayder agreed to merge Teletek with UPAY. In February 1992, Swan purchased a controlling interest in Teletek and became the chief executive and chairman of the Board of Directors of Teletek. Once he acquired Teletek, Swan entered into agreements with stockbrokers. Some of the agreements promised the stockbrokers cash payments by Teletek in exchange for promotion of UPAY and Teletek stock to their

customers. Teletek would also issue its stock to the stockbrokers under Securities and Exchange Commission (SEC) [*4] Regulation S-8, which permits stock to be issued in exchange for consulting services. None of the stockbrokers receiving such stock provided consulting services for Teletek or UPAY. Instead, they principally issued and promoted Teletek stock, thereby generating cash for the companies through increased stock sales that in turn drove up the price of Teletek's shares. Shwayder signed several documents filed with the SEC representing that these stock issues were for consulting services.

Shwayder remained involved with Teletek for about nine months after the merger. He then resigned. At about the time that Shwayder left Teletek, Teletek issued stock to Prinfan, a company owned by Shwayder's business associate, Neil Feinstein. According to Shwayder: Feinstein received the stock in exchange for consulting services. Feinstein then loaned money back to Shwayder. Shwayder repaid the loan in part by providing consulting services to Prinfan, and Feinstein for-gave the rest. The government's theory was that the consulting agreement with Feinstein, the stock issued to Prinfan, and the loan to Shwayder were all sham transactions designed to pay Shwayder substantial sums to leave Teletek.

For several [*5] years after Shwayder left Teletek, Swan continued paying bribes to induce brokers to sell Teletek stock. Ultimately, the price of Teletek collapsed and the company went bankrupt. Several investors were left with worthless stock or sold their Teletek stock at a significant loss.

Shwayder was named in a 110-count indictment charging him with racketeering in violation of 18 U.S.C. § 1962(c); RICO conspiracy in violation of 18 U.S.C. § 1962(d); conspiracy in violation of 18 U.S.C. § 371; securities fraud in violation of 15 U.S.C. §§ 78j(b), 78ff(a); wire fraud in

violation of 18 U.S.C. § 1343; and money laundering in violation of 18 U.S.C. §§ 1956, 1957. The alleged racketeering conspiracy involved the commission of various illegal acts, including: bribing stock promoters and stock brokers to sell shares of UPAY and Teletek; fraudulently issuing shares of stock to entities controlled by the defendants; participating in insider trading; manipulating the volume and price of stocks; filing false financial reports and statements and other public documents; [*6] and concealing and laundering the illegal proceeds from the scheme.

B. Retention of Counsel

Before the indictment issued in November 1996, Shwayder sought representation from an attorney, John Schlie, regarding any legal proceedings that might arise out of Teletek's activities. When Shwayder asked Schlie to represent him, Schlie initially declined because of his prior representation of Swan.

Schlie had represented Swan from October 1994 to May 1995. The representation concerned a grand jury investigation of bribes Swan allegedly paid to stockbrokers who agreed to promote UPAY and Teletek stock. During the course of his representation Schlie had confidential communications with Swan regarding certain bribes that became part of the conduct charged in this case. In response to letters accusing Swan of bribing brokers, Schlie conducted an investigation on Swan's behalf, met with a prosecutor to discuss a grand jury investigation regarding the bribes, and learned of allegations that Swan had committed perjury during a SEC deposition by lying about bribing brokers. Swan repeatedly told Schlie that he had never bribed brokers.

Following Schlie's initial refusal, Shwayder [*7] persisted in attempting to retain him. Schlie ultimately agreed to represent Shwayder, after he obtained Swan's permission and

both Swan and Shwayder signed waivers. Shwayder's waiver states: "Neither [Schlie] nor I am aware of any real conflicts of interest between my defense and that of Michael Swan." Swan's waiver states that Swan "did not, however, authorize the law firm to disclose any information subject to [his] attorney-client privilege."

C. The Trial

The joint trial of Shwayder, Swan and Kevin Orton, Teletek's accountant, lasted two months. The three defendants initially entered into a joint defense agreement. Almost one month into the trial, Swan pleaded guilty and agreed to testify for the prosecution. During trial, neither Schlie nor the prosecution informed the court of the conflict potentially posed by Schlie's prior representation of Swan.

Swan testified that he and other individuals had told Shwayder on several occasions of their bribery scheme. Swan also testified that Shwayder was present at meetings where agreements were made to bribe stockbrokers to sell Teletek stock and that Shwayder controlled a bank account that received illicit proceeds [*8] from the scheme.

Schlie cross-examined Swan on Shwayder's behalf. (Orton's counsel had already cross-examined Swan and vigorously attacked his credibility.) During cross-examination, Swan assented to Schlie's statement that Swan was somewhat of "a lone ranger," because he made deals and talked to people without communicating that information to others in the organization. Swan also agreed that "in a lot of circumstances" he would not tell Shwayder what was going on and admitted that he had told Shwayder that many of the issuances of stock were for legitimate purposes when they were not.

Schlie also asked questions designed to elicit the information that Swan was testifying as part of his plea agreement with the government; that his decision to plead guilty had reduced his sentence significantly; and that the government could later make a motion for downward departure to reduce his sentence further.

The government called 44 witnesses, including several of the stockbrokers who participated in the bribery scheme. Shwayder's former secretary, Annette Rosenberg, testified and implicated Shwayder in the scheme. The government also introduced a tape recording of a conversation in which [*9] Shwayder asked another participant how much of the money "he got to keep," and told that person how to explain a large payment received from Teletek.

Shwayder testified in his own defense. He maintained that he did not know the illegal purpose behind the acts in which he participated. To support this contention, Shwayder presented two character witnesses, both of whom gave positive opinions of Shwayder's honesty.

On cross-examination, the government questioned each of these witnesses regarding whether his opinion would change if Shwayder had committed certain acts alleged in the indictment. Shwayder's counsel never objected to the form of the questions. Character witness Jack Shaffer, a former director of Teletek, steadfastly answered these guilt-assuming questions with statements such as: "That does not match up with the man I know," "I don't think he would do something like that so I don't . . . think it applies," "I can't believe that that's true," and "I just don't believe Mr. Shwayder would do any-thing like that." n2 The government asked similar questions of Shwayder's other character witness, Dr. James Sorensen, a business associate that Shwayder had known for 15 years. n3 [*10]

----------Footnotes----------

n2 For example:

Q: Would it change your mind about whether Mr. Shwayder is an honest person if he lied in a certificate claiming he wasn't working with anyone to get his Teletek stock sold when, in fact, he was working with all kinds of people to get his Teletek stock sold?
A: I don't believe he'd do that.
Q: But if he did would it change your opinion of him?
A: I believe anybody that lies . . . if it's a serious thing then I think it's . . . something to a person's detrimental character.
Q: Would it change your opinion if he signed off on official filings with the [SEC], documents that are intended for public investors to be able to view, about issuing millions of shares of Teletek stock for imaginary consulting? . . .
A: I don't know anything about those kind of things, these are all conjectures kind of things. I don't think I'd change my mind about Mr. Shwayder because from what I know of him I believe him to be a totally honest person and ethical and above board. n3 For example:
Q: Now, would it change your opinion . . . if he lied about whether he was working in concert with other people to sell his Teletek stock, claiming that he wasn't working in concert with them, in fact, he was working with all sorts of people to get that stock sold? . . .
A: Well, I think I would need to know more about the situation, have a better understanding of the facts. . . . Well, if those are established facts, and I don't know that that's the case. I mean it's a hypothetical.
Q: Would it change your opinion . . . if he signed off on official filings with the [SEC] to issue millions of shares of stock for imaginary consulting services? . . .
A: Well, I would want to know more about how that came about, I mean whether or not he was fully informed. I mean it sounds like a complex transaction and if you have any

delegation of duties or you're working with other people on something, people can put something in front of you and assert that it's something and you sign it and it turns out not to be what you thought it was.
Q: Well, if Mr. Shwayder knew that the entities that were on this official form that he was signing hadn't really provided the consulting services, I want you to assume that much, and he goes right ahead and signs it that they had been, would that change your opinion . . . ?
A: I would need to know more about the situation.
Q: Well, if he lied about the reason why the stock was to be issued and worked with the public company to have official documents filed with the SEC claiming falsely that Prinfan was providing consulting services for this stock, would that be enough information for you to decide whether to change your opinion?
A: Well, if Mr. Shwayder fully understood that, I mean, again we're back to a factual situation where -- was he knowledgeable of all this, did he know all of these things?
Q: If this jury convicts Mr. Shwayder of all of these crimes that he's charged with, will that change your opinion about his character?"
A: It would cause me to want to look more carefully at the evidence that they reviewed that led to that conviction.

----------End Footnotes----------

In his closing argument, Schlie recalled Swan's testimony as follows:

Who signs all the documents filed with the [SEC]? Michael Swan. Who makes all the decisions on funding with all these brokers? Michael Swan. . . .

And I asked him, "You would tell Mr. Shwayder that these things were for promotional services, consulting services, investment banking agreements?" "That's right." That's what

he was telling Mr. Shwayder and he covered it with agreements that made the transactions, every one of them, look legitimate. There isn't one shred of evidence in his testimony or in this record that he told Keith Shwayder what was going on. . . .

. . . Keith Shwayder's a 60 year old man who never had legal problems before this. For nine months of his life he got involved with Michael Swan trying to do a business deal. Michael Swan abused that situation. Michael Swan lied to his wife. He lied to his lawyer. He lied to his friends. He lied to his business associates. He lied to Keith Shwayder. He lied to everyone. That's just the state of the evidence.

The jury convicted Shwayder of conspiracy, racketeering conspiracy, racketeering, money laundering, and some of the securities [*12] fraud and wire fraud counts. He was acquitted of two counts of wire fraud and one count of securities fraud.

D. Shwayder's Motion for A New Trial

After the trial, Shwayder retained new counsel and filed a motion for a new trial. The motion revealed Schlie's prior representation of Swan and contended that Schlie's presentation of Shwayder's case at trial was affected by an actual conflict. The district court ordered an evidentiary hearing on the motion.

At the hearing, Schlie testified that Swan had authorized him to use Swan's confidences in his representation of Shwayder, so long as they were not used to assist the government's case against Swan. Swan testified to the contrary -- that he did not give Schlie such authority but rather insisted that Schlie preserve his attorney-client confidentiality. Schlie's notes of a conversation among him, Swan, and Swan's new attorney state that he was permitted to talk to Shwayder as long as he

did not breach Swan's attorney/client privilege. Swan's waiver form states, consistent with those notes, that it does "not authorize the law firm to disclose any information subject to my attorney-client privilege."

The decision to enter [*13] into a joint defense agreement, Schlie testified, was not affected by his prior representation of Swan. Rather, it was a result of Schlie's belief, based in part on information gathered from mock jurors, that a finger-pointing strategy would not be successful in this case and that the best chance of acquittal for Shwayder and Orton was to acquit Swan. Schlie also testified that, in his view, nothing had changed regarding the conflict of interest issues once Swan pleaded guilty.

After the evidentiary hearing, the district court denied the motion for a new trial, stating:

. . . . Shwayder has failed to demonstrate that Schlie's brief representation of co-Defendant Swan and subsequent representation of him created an actual conflict of interest. Indeed, the testimony of John Schlie, which the court finds entirely credible, indicates there was really nothing Schlie failed to do or did in representing Shwayder which was based on or effected [sic] by his prior representation of Swan. In short, the Court finds that the evidence presented failed to reveal that any theoretical conflict caused an adverse effect on Schlie's representation of Shwayder so as to warrant a new trial. [*14]

The district court granted Shwayder's motion to reconsider its ruling on the new trial motion so as to allow Shwayder to present testimony from Nathan Drage, the attorney who participated in conversations with Schlie and Swan regarding the conflict waiver. After hearing Drage's testimony, the district court again denied the motion, stating:

Notwithstanding Defendant Shwayder's argument that the testimony of Co-Defendant Swan and Drage regarding the 1996 telephone conversation should be credited because they testified against their self interest, the Court maintains the view that the testimony of John Schlie regarding the 1996 conversation is the most credible version of the events occurring at that time. The Court's view of Mr. Schlie's credibility is reinforced by the opportunity the Court has had to interact with Mr. Schlie in the course of pretrial and trial proceedings related to this case.

II. DISCUSSION

A. Shwayder's Right to Conflict-Free Counsel

Shwayder argues that his trial counsel's former representation of Swan created an actual conflict of interest. Schlie's continuing duties of loyalty and confidentiality to his former client [*15] Swan, Shwayder further maintains, adversely affected Schlie's representation by preventing Schlie from (i) pointing the finger at Swan as a culprit who used Shwayder for his own nefarious purposes without informing him of the illegal scheme; and (ii) from attacking Swan's credibility during cross-examination. We conclude that although there was indeed an actual conflict of interest, it did not adversely affect Schlie's representation.

HN1The Sixth Amendment guarantees criminal defendants the right to effective assistance of counsel at trial. To establish a violation of this right, a defendant must ordinarily establish "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland v. Washington, 466 U.S. 668, 694, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984). However, "a defendant who shows that a conflict of interest actually affected the adequacy of his representation need not demonstrate prejudice in order to obtain relief." *Mickens v.*

Taylor, 535 U.S. 162, 122 S. Ct. 1237, 1243, 152 L. Ed. 2d 291 (2002) (quoting *Cuyler v. Sullivan*, 446 U.S. 335, 349-50, 64 L. Ed. 2d 333, 100 S. Ct. 1708 (1980)). [*16]

1. Waiver of Conflict

We note at the outset that Shwayder's waiver of his conflict of interest was not valid. The waiver document stated that there was no conflict of interest, so it can hardly be read as waiving one. Also, the document was signed before the indictment was issued and a few years before trial, so it could not have taken into account the actual scope of the case as it proceeded.

Furthermore, HN2"for a waiver to be knowing and intelligent, the defendant must have been sufficiently informed of the consequences of his choice." *Lockhart v. Terhune*, 250 F.3d 1223, 1232 (9th Cir. 2001) (internal quotation marks and citation omitted); see also id. (citing *United States v. Agosto*, 675 F.2d 965, 976-77 (8th Cir. 1982) (holding waiver invalid when the defendant was informed of a possible conflict due to attorney's prior representation of co-defendant and told that a conflict may arise from prior confidential communications but not told that a valid conflict may result from continued loyalty to co-defendant)). Schlie never raised the conflict issue with Shwayder or the court after Swan's guilty plea altered the potential risks posed [*17] by Schlie's representation of Shwayder. In fact, Schlie testified that he never felt that there was a conflict issue that he needed to discuss with his client.

Because Shwayder was never adequately informed of the significance of the various conflicts that might arise from Schlie's former representation of Shwayder, Shwayder did not waive his right to conflict-free counsel. We therefore turn to the question whether there was an actual conflict and, if so, it affected Schlie's representation of Shwayder.

2. Actual Conflict

HN3"In successive representation, conflicts of interest may arise if the cases are substantially related or if the attorney reveals privileged communications of the former client or otherwise divides his loyalties." *Fitzpatrick v. McCormick*, 869 F.2d 1247, 1252 (9th Cir. 1989) (internal quotation marks and citation omitted). One of the risks created by successive representation is "that the attorney who has obtained privileged information from the former client may fail to conduct a rigorous cross-examination [of that client] for fear of misusing that confidential information." Id. The potential for conflict is particularly acute when [*18] the two clients are co-defendants who allege different levels of culpability. Id.

Applying these standards, we conclude that there was an actual conflict of interest. Schlie represented Swan in matters that directly concerned bribing stockbrokers to sell Teletek stock. From the beginning of this litigation, Shwayder had an interest in laying the blame on Swan and portraying himself as the victim. The conflict between the two alleged coconspirators became greater when Swan agreed to plead guilty and testify against Shwayder for the prosecution. See *United States v. Malpiedi*, 62 F.3d 465, 469 (2d Cir. 1995). By shifting the blame to Swan through cross-examination concerning matters on which he had previously represented him, Schlie could have breached his duty of loyalty to Swan -- or at least could have feared that he would appear to do so and therefore avoided certain areas of inquiry. n4

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n4 The government contends that there was no actual conflict of interest because "there was unquestionably no further potential harm to Swan from any cross-examination which

Schlie might have pursued." This assertion is not true. Swan had yet to be sentenced. Effective testimony could have affected his sentence through a substantial assistance departure. Conversely, if Swan lied on the stand, an obstruction of justice enhancement was a possibility.

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3. Adverse Effect on Schlie's Representation of Shwayder

HN4To show that an actual conflict had an adverse effect, the defendant must establish that it "affected the counsel's performance, as opposed to a mere theoretical division of loyalties." *Mickens*, 122 S. Ct. at 1243. The showing must be that "counsel was influenced in his basic strategic decisions by the interests [of the former client]," as where the conflict "prevents an attorney . . . from arguing the relative involvement and culpability of his clients in order to minimize the culpability of one by emphasizing the other," *Wheat v. United States*, 486 U.S. 153, 160, 100 L. Ed. 2d 140, 108 S. Ct. 1692 (1988).

Shwayder insists that there were such effects, including Schlie's failure to: blame Swan in the opening statement; establish on cross-examination that Swan was lying in order to procure a substantial assistance downward departure in sentencing; attack Swan's credibility vigorously on cross-examination; question Swan about lying to Schlie by telling him that the bribes were actually compensation for investment banking services; and impeach Swan's credibility with the lies that [*20] Swan had told Schlie about paying brokers to retail Teletek stock. The district court concluded, however, that Schlie credibly testified that his representation was not affected by the conflict. The court denied a new trial primarily on that ground.

Ordinarily, the district court's determinations of credibility, on conflict issues as on any other, should not be second-guessed. In particular, "the district judge, who presumably is familiar with the legal talents and character of the lawyers who practice at the local bar and who saw and heard the witness testify, is in a far better position than we are to evaluate a charge of [conflict of interest]." *Burger v. Kemp*, 483 U.S. 776, 785, 97 L. Ed. 2d 638, 107 S. Ct. 3114 (1987). n5 Yet, as we have had occasion to note, HN5"the existence of a conflict of interest cannot be governed solely by the perceptions of the attorney; rather, the court itself must examine the record to discern whether the attorney's behavior seems to have been influenced by the suggested conflict." *Sanders v. Ratelle*, 21 F.3d 1446, 1452 (9th Cir. 1994). Human self-perception regarding one's own motives for particular actions in difficult [*21] circumstances is too faulty to be relied upon, even if the individual reporting is telling the truth as he perceives it. See *Malpiedi*, 62 F.3d at 470 ("after-the-fact testimony by a lawyer who was precluded by a conflict of interest from pursuing a strategy or tactic is not helpful. Even the most candid persons may be able to convince them-selves that they actually would not have used that strategy or tactic anyway, when the alternative is a confession of ineffective assistance resulting from ethical limitations.") Legal and judicial ethics rules so assume, banning lawyers and judges from taking on cases in certain conflict situations even if they are certain that the objective conflict will have no influence on them and are prepared to take every precaution to preclude such influence.

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n5 At least some of Schlie's testimony -- that concerning the actual scope of the waiver -- was contradicted by his own notes, Swan's testimony and that of his attorney, Drage, and the waiver form itself. The district court did not note these contradictions. As we have determined that there was an

actual conflict whatever Schlie may have believed and do not rely on Schlie's own perception regarding that conflict in evaluating its impact, we need not decide whether the district court's credibility determination is clearly erroneous.

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Nevertheless, evidence in the record independent of Schlie's testimony at the evidentiary hearing confirms that Schlie's conflict did not adversely affect his representation of Shwayder. Schlie carried out precisely the type of representation Shwayder maintained that his trial attorney could not and did not provide because of his conflict.

In his opening statement, Schlie emphasized that the trial would come down to knowledge and that the jurors would have to make their decisions on each individual defendant independently. Once Swan pleaded guilty, Schlie attempted to point the finger at Swan and to attack his credibility. Schlie cross-examined government witnesses and examined defense witnesses with questions directed at establishing that Swan alone was to blame. He asked about Swan's lies to Shwayder. While cross-examining Swan, Schlie elicited testimony that Swan never told Shwayder that he was paying off stockbrokers. Schlie also assured that the jury was aware that Swan would receive a much lower sentence by pleading guilty and that the government could further reduce his sentence.

Moreover, even if he was conscientious about preserving confidences, Schlie was not in fact [*23] ethically restricted from questioning Swan about most of the subjects on which they had prior confidential communications. Virtually all of that information was available, independent of any lawyer/client confidences, through the indictment, the trial testimony, and the evidence provided to the defense on discovery.

There was one fact not available from an independent source -- that Swan had lied to Schlie during his prior representation. It is impossible, however, to characterize Schlie's failure to mention this fact as an adverse effect caused by his former representation of Swan. Schlie's communications with Swan were protected by the attorney-client privilege, so they could not have been elicited by any other lawyer either. Schlie did, nevertheless, emphasize in closing that Swan had lied to everyone else, specifically mentioning "his [other] lawyer," as well as Shwayder.

We conclude that although Schlie had an actual conflict of interest, his former representation of Swan did not adversely affect his representation of Shwayder. We therefore affirm the district court's denial of Shwayder's motion for a new trial.

B. Use of Guilt-Assuming Hypotheticals to Cross-Examine [*24] Character Witnesses

Although he did not raise the point in the district court, Shwayder now argues that the prosecution's use of guilt-assuming hypotheticals during cross-examination of Shwayder's character witnesses constitutes reversible error. HN6We review for plain error. *United States v. Antonakeas*, 255 F.3d 714, 727 (9th Cir. 2001). HN7Under the plain error standard, relief is not warranted unless there has been "(1) error, (2) that was clear or obvious, (3) that affected substantial rights, and (4) that seriously affected the fairness, integrity, or public reputation of the judicial proceedings." *United States v. Vences*, 169 F.3d 611, 613 (9th Cir. 1999) (citation omitted).

1. Error

HN8Federal Rule of Evidence 405(a) allows the government to cross-examine character witnesses regarding their

knowledge of specific instances of the defendant's misconduct. Fed. R. Evid. 405(a) HN9("In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion. On cross-examination, inquiry is allow-able into relevant specific instances [*25] of conduct.") Such cross-examination helps the jury evaluate the quality of the character testimony.

We have not yet addressed whether it is error for the prosecution to ask questions on cross-examination that assume the defendant's guilt of the precise acts for which he is on trial. n6 The reasons for why it is error were cogently stated by the Fourth Circuit:

Character testimony in a criminal trial is admitted pursuant to Rule 405(a) of the Federal Rules of Evidence only as it may bear on the issue of guilt. Although an argument can be made that guilt-assuming hypothetical questions may be probative of the credibility of a non-expert witness, an opinion elicited by a question that assumes that the defendant is guilty can have only negligible probative value as it bears on the central issue of guilt.

And, in addition to a proper application of the rules of evidence, adherence to a basic concept of our justice system, the presumption of innocence, is not served by this line of questioning.

United States v. Mason, 993 F.2d 406, 408-09 (4th Cir. 1993) (footnote omitted). HN10Following almost every other circuit that has addressed [*26] the question, n7 we now hold that the use of guilt assuming hypotheticals undermines the presumption of innocence and thus violates a defendant's right to due process. The prosecution's use of guilt-assuming hypothetical questions on cross-examination of Shwayder's character witnesses therefore constituted error.

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n6 We have noted the issue but found it unnecessary to decide. *United States v. Velasquez*, 980 F.2d 1275, 1277 (9th Cir. 1992).

n7 Several other circuits have forbidden use of such questions on due process and presumption of innocence grounds. See *United States v. Guzman*, 167 F.3d 1350, 1352 (11th Cir. 1999) ("The government may not . . . pose hypothetical questions that assume the guilt of the accused in the very case at bar."); *United States v. Oshatz*, 912 F.2d 534, 539 (2d Cir. 1990) ("The jury might infer from the judge's permission to ask a guilt-based hypothetical question that the prosecutor has evidence of guilt beyond the evidence in the record."); *United States v. McGuire*, 744 F.2d 1197, 1204 (6th Cir. 1984) ("It would be error to allow the prosecution to ask the character witness to assume defendant's guilt of the offenses for which he is then on trial."); *United States v. Williams*, 738 F.2d 172, 177 (7th Cir. 1984) (Guilt-assuming hypotheticals "allow[ ] the prosecution to foist its theory of the case repeatedly on the jury and to force an unsuspecting witness to speculate on the effect of a possible conviction."); *United States v. Candelaria-Gonzalez*, 547 F.2d 291, 294 (5th Cir. 1977) ("These hypothetical questions [strike] at the very heart of the presumption of innocence which is fundamental to Anglo-Saxon concepts of fair trial.") Only the District of Columbia Circuit has held that witnesses testifying about their opinion of a defendant's character may be asked guilt-assuming hypothetical questions on cross-examination, but the court distinguished reputation witnesses, for whom such questions may be improper. *United States v. White*, 281 U.S. App. D.C. 39, 887 F.2d 267, 274-75 (D.C. Cir. 1989).

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To be plain, however, an error must have been clear or obvious. *United States v. Turman*, 122 F.3d 1167, 1170 (9th Cir. 1997). Neither the Supreme Court nor the Ninth Circuit has previously addressed the guilt-assuming hypothetical question. The government contends that the error therefore was not plain.

It is, indeed, not clear that an error can be deemed "plain" in such circumstances. See *United States v. Thompson*, 82 F.3d 849, 855 (9th Cir. 1996)

("We do not see how an error can be plain error when the Supreme Court and this court have not spoken on the subject, and the authority in other circuits is split." (internal quotation marks and citation omitted)). We need not decide, however, whether the near-unanimity among the other circuits distinguishes this case from Thompson. There are other reasons that there was no plain error -- the error did not affect Shwayder's substantial rights or "seriously affect[ ] the fairness, integrity, or public reputation of the judicial proceedings." *Vences*, 169 F.3d at 613.

2. Effect on Substantial Rights

The prosecution's improper use of guilt-assuming hypothetical questions did not [*28] affect Shwayder's substantial rights. Both Shwayder's character witnesses declined to answer many of the hypothetical questions. Also, each of the character witnesses, when he did answer guilt-assuming questions, did so with statements expressing his disbelief that Shwayder would ever be capable of knowingly committing such acts, thereby bolstering rather than detracting from his positive opinion of the defendant's honesty.

In a case where similar answers were provided by character witnesses, the Eleventh Circuit stated:

The harm in allowing the use of this type of improper hypothetical lies in the effect of having the defendant's own character witness assume that the defendant is guilty. Here, the witness essentially refused to accept that assumption. The government's improper question backfired and, arguably, Guzman's case was strengthened by [the] response. It strains credulity to maintain that, in such context, the question attenuated the presumption of innocence to which Guzman was entitled.

Guzman, 167 F.3d at 1353-54. The *Guzman* court went on to find it "clear beyond a reasonable doubt that the jury would have returned the same verdict [*29] if the question had not been asked." Id. at 1354. Similarly, here -- and even more clearly, as we are applying the plain error standard -- the prosecution's use of guilt-assuming hypotheticals did not affect Shwayder's substantial rights. The witnesses' answers negated any harm that may have been caused by the government's use of these questions. As a result, Shwayder has not established that the jury's verdict would have been different if the questions had not been asked.

Although Shwayder has not met the third prong of the plain error standard, we note that the error in this case also did not "seriously affect the fairness, integrity, or public reputation of the proceedings." Shwayder's attorney, having presumably prepared the character witnesses, may well have anticipated that they would answer the guilt-assuming hypotheticals in a manner favorable to the defense. His failure to object to the government's repeated questions may therefore have been a deliberate, tactical decision. Where such tactical behavior is likely, we should take great care before exercising our discretion to reverse for plain error.

We therefore hold that asking character witnesses hypothetical [*30] questions that assume the defendant's

guilt during cross-examination is error. Nevertheless, the error did not affect Shwayder's substantial rights and thus does not warrant reversal under the plain error standard.

C. Sentencing

In sentencing Shwayder, the district court enhanced the base offense levels under the United States Sentencing Guide-lines for some of his convictions, such as those for obstruction of justice, U.S.S.G. § 3C1.1, and money laundering, U.S.S.G. § 2S1.2. Shwayder argues that the district court erred under *Apprendi v. New Jersey*, 530 U.S. 466, 147 L. Ed. 2d 435, 120 S. Ct. 2348 (2000), by making factual findings used to increase his base offense levels, rather than referring the factual questions to the jury. We reject this argument because HN11"Apprendi does not alter the authority of the judge to sentence within the statutory range provided by Congress." *United States v. Buckland*, 289 F.3d 558, 570 (9th Cir. 2002) (en banc); see also *United States v. Johansson*, 249 F.3d 848, 861-62 (9th Cir. 2001).

III. CONCLUSION

Shwayder's trial counsel had an actual conflict of interest because [*31] of his prior representation of Shwayder's codefendant, but the conflict did not adversely affect the representation Shwayder received. Similarly, although the government's use of guilt-assuming hypothetical questions during its cross-examination of Shwayder's character witnesses violated due process, the error does not warrant reversal. Shwayder's sentencing was correctly determined. We therefore affirm Shwayder's convictions and sentence.

AFFIRMED.

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APPENDIX F

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, RULES AND REGULATIONS INVOLVED

15 U.S.C. § 78j provides:

§ 78j. Manipulative and deceptive devices

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange--

(a)

(1) To effect a short sale, or to use or employ any stop-loss order in connection with the purchase or sale, of any security registered on a national securities exchange, in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

(2) Paragraph (1) of this subsection shall not apply to security futures products.

(b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, or any securities-based swap agreement (as defined in section 206B of the Gramm-Leach-Bliley Act [15 USCS § 78c note]), any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

Rules promulgated under subsection (b) that prohibit fraud, manipulation, or insider trading (but not rules imposing or specifying reporting or recordkeeping requirements, procedures, or

standards as prophylactic measures against fraud, manipulation, or insider trading), and judicial precedents decided under subsection (b) and rules promulgated thereunder that prohibit fraud, manipulation, or insider trading, shall apply to security-based swap agreements (as defined in section 206B of the Gramm-Leach-Bliley Act [15 USCS § 78c note]) to the same extent as they apply to securities. Judicial precedents decided under section 17(a) of the Securities Act of 1933 [15 USCS § 77q(a)] and sections 9, 15, 16, 20, and 21A of this title [15 USCS §§ 78i, 78o, 78p, 78t, and 78u-1], and judicial precedents decided under applicable rules promulgated under such sections, shall apply to security-based swap agreements (as defined in section 206B of the Gramm-Leach-Bliley Act [15 USCS § 78c note]) to the same extent as they apply to securities. *Id.* (As amended June 6, 1934, ch 404, Title I, § 10, 48 Stat. 891; Dec. 21, 2000, P.L. 106-554, § 1(a)(5), 114 Stat. 2763.)

15 U.S.C. § 78ff provides:

§ 78ff. Penalties

(a) Willful violations; false and misleading statements. Any person who willfully violates any provision of this title (other than section 30A [15 USCS § 78dd-1]), or any rule or regulation thereunder the violation of which is made unlawful or the observance of which is required under the terms of this title, or any person who willfully and knowingly makes, or causes to be made, any statement in any

application, report, or document required to be filed under this title or any rule or regulation thereunder or any undertaking contained in a registration statement as provided in subsection (d) of section 15 of this title [15 USCS § 78o(d)], or by any self-regulatory organization in connection with an application for membership or participation therein or to become associated with a member thereof, which statement was false or misleading with respect to any material fact, shall upon conviction be fined not more than $ 5,000,000, or imprisoned not more than 20 years, or both, except that when such person is a person other than a natural person, a fine not exceeding $ 25,000,000 may be imposed; but no person shall be subject to imprisonment under this section for the violation of any rule or regulation if he proves that he had no knowledge of such rule or regulation.

(b) Failure to file information, documents, or reports. Any issuer which fails to file information, documents, or reports required to be filed under subsection (d) of section 15 of this title [15 USCS § 78o(d)] or any rule or regulation thereunder shall forfeit to the United States the sum of $ 100 for each and every day such failure to file shall continue. Such forfeiture, which shall be in lieu of any criminal penalty for such failure to file which might be deemed to arise under subsection (a) of this section, shall be payable to the Treasury of the United States and shall be recoverable in a civil suit in the name of the United States.

(c) Violations by issuers, officers, directors, stockholders, employees, or agents of issuers.

(1) (A) Any issuer that violates subsection (a) or (g) of section 30A [15 USCS § 78dd-1] shall be fined not more than $ 2,000,000.

(B) Any issuer that violates subsection (a) or (g) of section 30A [15 USCS § 78dd-1] shall be subject to a civil penalty of not more than $ 10,000 imposed in an action brought by the Commission.

(2) (A) Any officer, director, employee, or agent of an issuer, or stockholder acting on behalf of such issuer, who willfully violates subsection (a) or (g) of section 30A of this title [15 USCS § 78dd-1] shall be fined not more than $ 100,000, or imprisoned not more than 5 years, or both.

(B) Any officer, director, employee, or agent of an issuer, or stockholder acting on behalf of such issuer, who violates subsection (a) or (g) of section 30A of this title [15 USCS § 78dd-1] shall be subject to a civil penalty of not more than $ 10,000 imposed in an action brought by the Commission.

(3) Whenever a fine is imposed under paragraph (2) upon any officer, director, employee, agent, or stockholder of an issuer, such fine may not be paid, directly or indirectly, by such issuer. *Id.* (As amended Nov. 10, 1998, P.L. 105-366, § 2(d), 112 Stat. 3303; July 30, 2002, P.L. 107-204, Title XI, § 1106, 116 Stat. 810.)

18 U.S.C. § 2 provides:

§ 2. Principals

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal. *Id.* (As amended June 25, 1948, ch 645, § 1, 62 Stat. 684; Oct. 31, 1951, ch 655, § 17b, 65 Stat. 717.)

18 U.S.C. § 371 provides as follows:

§ 371. Conspiracy to commit offense or to defraud United States

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined under this title or imprisoned not more than five years, or both.
If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor. *Id.* (As amended Sept. 13, 1994, P.L. 103-322, Title XXXIII, § 330016(1)(L), 108 Stat. 2147.)

18 U.S.C. § 1343 provides:

§ 1343. Fraud by wire, radio, or television

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined under this title or imprisoned not more than five years, or both. If the violation affects a financial institution, such person shall be fined not more than $ 1,000,000 or imprisoned not more than 30 years, or both. *Id.*

18 U.S.C. § 1956 provides:

18 U.S.C. § 1956. Laundering of monetary instruments

(a) (1) Whoever, knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity, conducts or attempts to conduct such a financial transaction which in fact involves the proceeds of specified unlawful activity--

(A) (i) with the intent to promote the carrying on of specified unlawful activity; or

(ii) with intent to engage in conduct constituting a violation of section 7201 or 7206 of the Internal Revenue Code of 1986 [26 USCS § 7201 or 7206]; or

(B) knowing that the transaction is designed in whole or in part-

(i) to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity; or

(ii) to avoid a transaction reporting requirement under State or Federal law,

shall be sentenced to a fine of not more than $ 500,000 or twice the value of the property involved in the transaction, whichever is greater, or imprisonment for not more than twenty years, or both.

(2) Whoever transports, transmits, or transfers, or attempts to transport, transmit, or transfer a monetary instrument or funds from a place in the United States to or through a place outside the United States or to a place in the United States from or through a place outside the United States--

(A) with the intent to promote the carrying on of specified unlawful activity; or

(B) knowing that the monetary instrument or funds involved in the transportation represent the proceeds of some form of unlawful activity and knowing that such transportation, transmission, or transfer is designed in whole or in part--

(i) to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity; or

(ii) to avoid a transaction reporting requirement under State or Federal law,

shall be sentenced to a fine of not more than $ 500,000 or twice the value of the monetary instrument or funds involved in the transportation, transmission, or transfer, whichever is greater, or imprisonment for not

more than twenty years, or both. For the purpose of the offense described in subparagraph (B), the defendant's knowledge may be established by proof that a law enforcement officer represented the matter specified in subparagraph (B) as true, and the defendant's subsequent statements or actions indicate that the defendant believed such representations to be true.

(3) Whoever, with the intent--

(A) to promote the carrying on of specified unlawful activity;

(B) to conceal or disguise the nature, location, source, ownership, or control of property believed to be the proceeds of specified unlawful activity; or

(C) to avoid a transaction reporting requirement under State or Federal law,

conducts or attempts to conduct a financial transaction involving property represented to be the proceeds of specified unlawful activity, or property used to conduct or facilitate specified unlawful activity, shall be fined under this title or imprisoned for not more than 20 years, or both. For purposes of this paragraph and paragraph (2), the term "represented" means any representation made by a law enforcement officer or by another person at the direction of, or with the approval of, a Federal official authorized to investigate or prosecute violations of this section.

(b) Whoever conducts or attempts to conduct a transaction described in subsection (a)(1) or (a)(3), or a transportation, transmission, or transfer described in subsection (a)(2), is liable to the United States

for a civil penalty of not more than the greater of--

(1) the value of the property, funds, or monetary instruments involved in the transaction; or

(2) $ 10,000.

(c) As used in this section--

(1) the term "knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity" means that the person knew the property involved in the transaction represented proceeds from some form, though not necessarily which form, of activity that constitutes a felony under State, Federal, or foreign law, regardless of whether or not such activity is specified in paragraph (7);

(2) the term "conducts" includes initiating, concluding, or participating in initiating, or concluding a transaction;

(3) the term "transaction" includes a purchase, sale, loan, pledge, gift, transfer, delivery, or other disposition, and with respect to a financial institution includes a deposit, withdrawal, transfer between accounts, exchange of currency, loan, extension of credit, purchase or sale of any stock, bond, certificate of deposit, or other monetary instrument, use of a safe deposit box, or any other payment, transfer, or delivery by, through, or to a financial institution, by whatever means effected;

(4) the term "financial transaction" means (A) a transaction which in any way or degree affects interstate or foreign commerce (i) involving the movement of funds by wire or other means or (ii) involving one or more

monetary instruments, or (iii) involving the transfer of title to any real property, vehicle, vessel, or aircraft, or (B) a transaction involving the use of a financial institution which is engaged in, or the activities of which affect, interstate or foreign commerce in any way or degree;

(5) the term "monetary instruments" means (i) coin or currency of the United States or of any other country, travelers' checks, personal checks, bank checks, and money orders, or (ii) investment securities or negotiable instruments, in bearer form or otherwise in such form that title thereto passes upon delivery;

(6) the term "financial institution" has the definition given that term in section 5312(a)(2) of title 31, United States Code, or the regulations promulgated thereunder;

(7) the term "specified unlawful activity" means--

(A) any act or activity constituting an offense listed in section 1961(1) of this title except an act which is indictable under subchapter II of chapter 53 of title 31 [31 USCS §§ 5311 et seq.];

(B) with respect to a financial transaction occurring in whole or in part in the United States, an offense against a foreign nation involving--

(i) the manufacture, importation, sale, or distribution of a controlled substance (as such term is defined for the purposes of the Controlled Substances Act);

(ii) murder, kidnapping, robbery, extortion, or destruction of property by means of explosive or fire;

(iii) fraud, or any scheme or attempt to defraud, by or against a foreign bank (as defined in paragraph 7 of section 1(b) of the International Banking Act of 1978 [12 USCS § 3101(7)]);

(C) any act or acts constituting a continuing criminal enterprise, as that term is defined in section 408 of the Controlled Substances Act (21 U.S.C. 848);

(D) an offense under section 32 (relating to the destruction of aircraft), section 37 (relating to violence at international airports), section 115 (relating to influencing, impeding, or retaliating against a Federal official by threatening or injuring a family member), section 152 (relating to concealment of assets; false oaths and claims; bribery), section 215 (relating to commissions or gifts for procuring loans), section 351 (relating to congressional or Cabinet officer assassination), any of sections 500 through 503 (relating to certain counterfeiting offenses), section 513 (relating to securities of States and private entities), section 542 (relating to entry of goods by means of false statements), section 545 (relating to smuggling goods into the United States), section 549 (relating to removing goods from Customs custody), section 641 (relating to public money, property, or records), section 656 (relating to theft, embezzlement, or misapplication by bank officer or employee), section 657 (relating to lending, credit, and insurance institutions), section 658 (relating to property mortgaged or pledged to farm credit agencies), section 666 (relating to theft or bribery concerning programs receiving

Federal funds), section 793, 794, or 798 (relating to espionage), section 831 (relating to prohibited transactions involving nuclear materials), section 844 (f) or (i) (relating to destruction by explosives or fire of Government property or property affecting interstate or foreign commerce), section 875 (relating to interstate communications), section 956 (relating to conspiracy to kill, kidnap, maim, or injure certain property in a foreign country), section 1005 (relating to fraudulent bank entries), 1006 (relating to fraudulent Federal credit institution entries), 1007 (relating to Federal Deposit Insurance transactions), 1014 (relating to fraudulent loan or credit applications), 1032 (relating to concealment of assets from conservator, receiver, or liquidating agent of financial institution), section 12-5-02 (relating to murder), section 1114 (relating to murder of United States law enforcement officials), section 1116 (relating to murder of foreign officials, official guests, or internationally protected persons), section 1201 (relating to kidnaping), section 1203 (relating to hostage taking), section 1361 (relating to willful injury of Government property), section 1363 (relating to destruction of property within the special maritime and territorial jurisdiction), section 1708 (theft from the mail), section 1751 (relating to Presidential assassination), section 2113 or 2114 (relating to bank and postal robbery and theft), section 2280 (relating to violence against maritime navigation), section 2281 (relating to violence against maritime fixed platforms), section 2319 (relating to copyright infringement),

section 2320 (relating to trafficking in counterfeit goods and services), section 2332 (relating to terrorist acts abroad against United States nationals), section 2332a (relating to use of weapons of mass destruction), section 2332b (relating to international terrorist acts transcending national boundaries), or section 2339A (relating to providing material support to terrorists) of this title, section 46502 of title 49, United States Code, a felony violation of the Chemical Diversion and Trafficking Act of 1988 (relating to precursor and essential chemicals), section 590 of the Tariff Act of 1930 (19 U.S.C. 1590) (relating to aviation smuggling), section 422 of the Controlled Substances Act [21 USCS § 863] (relating to transportation of drug paraphernalia), section 38(c) (relating to criminal violations) of the Arms Export Control Act [22 USCS § 2778(c)], section 11 (relating to violations) of the Export Administration Act of 1979 [50 USCS Appx. § 2410], section 206 (relating to penalties) of the International Emergency Economic Powers Act [50 USCS § 1705], section 16 (relating to offenses and punishment) of the Trading with the Enemy Act [50 USCS Appx § 16], any felony violation of section 15 of the Food Stamp Act of 1977 [7 USCS § 2024] (relating to food stamp fraud) involving a quantity of coupons having a value of not less than $ 5,000, or any felony violation of the Foreign Corrupt Practices Act; or

(E) Environmental Crimes. a felony violation of the Federal Water Pollution Control Act (33 U.S.C. 1251 et seq.), the Ocean Dumping Act (33 U.S.C. 1401 et seq.),

the Act to Prevent Pollution from Ships (33 U.S.C. 1901 et seq.), the Safe Drinking Water Act (42 U.S.C. 300f et seq.), or the Resources Conservation and Recovery Act (42 U.S.C. 6901 et seq.).

(F) Any act or activity constituting an offense involving a Federal health care offense.

(8) the term "State" includes a State of the United States, the District of Columbia, and any commonwealth, territory, or possession of the United States.

(d) Nothing in this section shall supersede any provision of Federal, State, or other law imposing criminal penalties or affording civil remedies in addition to those provided for in this section.

(e) Violations of this section may be investigated by such components of the Department of Justice as the Attorney General may direct, and by such components of the Department of the Treasury as the Secretary of the Treasury may direct, as appropriate and, with respect to offenses over which the United States Postal Service has jurisdiction, by the Postal Service. Such authority of the Secretary of the Treasury and the Postal Service shall be exercised in accordance with an agreement which shall be entered into by the Secretary of the Treasury, the Postal Service, and the Attorney General. Violations of this section involving offenses described in paragraph (c)(7)(E) may be investigated by such components of the Department of Justice as the Attorney General may direct, and the National Enforcement Investigations Center of the Environmental Protection Agency.

(f) There is extraterritorial jurisdiction over the conduct prohibited by this section if--

(1) the conduct is by a United States citizen or, in the case of a non-United States citizen, the conduct occurs in part in the United States; and

(2) the transaction or series of related transactions involves funds or monetary instruments of a value exceeding $ 10,000.

(g) Notice of conviction of financial institutions. If any financial institution or any officer, director, or employee of any financial institution has been found guilty of an offense under this section, section 1957 or 1960 of this title, or section 5322 or 5324 of title 31, the Attorney General shall provide written notice of such fact to the appropriate regulatory agency for the financial institution.

(h) Any person who conspires to commit any offense defined in this section or section 1957 shall be subject to the same penalties as those prescribed for the offense the commission of which was the object of the conspiracy. *Id.*

18 U.S.C. § 1957 provides:

§ 1957. Engaging in monetary transactions in property derived from specified unlawful activity

(a) Whoever, in any of the circumstances set forth in subsection (d), knowingly engages or attempts to engage in a monetary transaction in criminally derived property that is of a value greater than $ 10,000 and is derived

from specified unlawful activity, shall be punished as provided in subsection (b).

(b) (1) Except as provided in paragraph (2), the punishment for an offense under this section is a fine under title 18, United States Code, or imprisonment for not more than ten years or both.

(2) The court may impose an alternate fine to that imposable under paragraph (1) of not more than twice the amount of the criminally derived property involved in the transaction.

(c) In a prosecution for an offense under this section, the Government is not required to prove the defendant knew that the offense from which the criminally derived property was derived was specified unlawful activity.

(d) The circumstances referred to in subsection (a) are--

(1) that the offense under this section takes place in the United States or in the special maritime and territorial jurisdiction of the United States; or

(2) that the offense under this section takes place outside the United States and such special jurisdiction, but the defendant is a United States person (as defined in section 3077 of this title, but excluding the class described in paragraph (2)(D) of such section).

(e) Violations of this section may be investigated by such components of the Department of Justice as the Attorney General may direct, and by such components of the Department of the Treasury as the Secretary of

the Treasury may direct, as appropriate and, with respect to offenses over which the United States Postal Service has jurisdiction, by the Postal Service. Such authority of the Secretary of the Treasury and the Postal Service shall be exercised in accordance with an agreement which shall be entered into by the Secretary of the Treasury, the Postal Service, and the Attorney General.

(f) As used in this section--

(1) the term "monetary transaction" means the deposit, withdrawal, transfer, or exchange, in or affecting interstate or foreign commerce, of funds or a monetary instrument (as defined in section 1956(c)(5) of this title) by, through, or to a financial institution (as defined in section 1956 of this title), including any transaction that would be a financial transaction under section 1956(c)(4)(B) of this title, but such term does not include any transaction necessary to preserve a person's right to representation as guaranteed by the sixth amendment to the Constitution;

(2) the term "criminally derived property" means any property constituting, or derived from, proceeds obtained from a criminal offense; and

(3) the term "specified unlawful activity" has the meaning given that term in section 1956 of this title. *Id.* (As amended Sept. 23, 1994, P.L. 103-325, Title IV, § 413(c)(2), 108 Stat. 2255.)

18 U.S.C. § 1962 provides:

§ 1962. Prohibited activities

(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. A purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern or racketeering activity or the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer.

(b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section. *Id.* (As amended Oct. 15, 1970, P.L. 91-452, Title IX,§ 901(a), 84 Stat. 942; Nov. 18, 1988, P.L. 100-690, Title VII, Subtitle B, § 7033, 102 Stat. 4398.)

18 U.S.C. § 3663 provides in relevant part:

§ 3663. Order of restitution

(a) (1) (A) The court, when sentencing a defendant convicted of an offense under this title, section 401, 408(a), 409, 416, 420, or 422(a) of the Controlled Substances Act (21 U.S.C. 841, 848(a), 849, 856, 861, 863) (but in no case shall a participant in an offense under such sections be considered a victim of such offense under this section), or section 46312, 46502, or 46504 of title 49, other than an offense described in section 3663A(c), may order, in addition to or, in the case of a misdemeanor, in lieu of any other penalty authorized by law, that the defendant make restitution to any victim of such offense, or if the victim is deceased, to the victim's estate. The court may also order, if agreed to by the

parties in a plea agreement, restitution to persons other than the victim of the offense.

(B) (i) The court, in determining whether to order restitution under this section, shall consider--

(I) the amount of the loss sustained by each victim as a result of the offense; and

(II) the financial resources of the defendant, the financial needs and earning ability of the defendant and the defendant's dependents, and such other factors as the court deems appropriate.

(ii) To the extent that the court determines that the complication and prolongation of the sentencing process resulting from the fashioning of an order of restitution under this section outweighs the need to provide restitution to any victims, the court may decline to make such an order.

(2) For the purposes of this section, the term "victim" means a person directly and proximately harmed as a result of the commission of an offense for which restitution may be ordered including, in the case of an offense that involves as an element a scheme, conspiracy, or pattern of criminal activity, any person directly harmed by the defendant's criminal conduct in the course of the scheme, conspiracy, or pattern. In the case of a victim who is under 18 years of age, incompetent, incapacitated, or deceased, the legal guardian of the victim or representative of the victim's estate, another family member, or any other person appointed as suitable by the court, may assume the victim's rights under this section, but in no event shall the defendant be named as such representative or guardian.

(3) The court may also order restitution in any criminal case to the extent agreed to by the parties in a plea agreement.

(b) The order may require that such defendant--

(1) in the case of an offense resulting in damage to or loss or destruction of property of a victim of the offense--

(A) return the property to the owner of the property or someone designated by the owner; or

(B) if return of the property under subparagraph (A) is impossible, impractical, or inadequate, pay an amount equal to the greater of--

(i) the value of the property on the date of the damage, loss, or destruction, or

(ii) the value of the property on the date of sentencing,

less the value (as of the date the property is returned) of any part of the property that is returned;

* * * * * * * * * * *

(d) An order of restitution made pursuant to this section shall be issued and enforced in accordance with section 3664. *Id.* (As amended Oct. 17, 2000, P.L. 106-310, Div B, Title XXXVI, Subtitle A, Part I, § 3613(c), 114 Stat. 1230.)

18 U.S.C. § 3664 provides in relevant part:

§ 3664. Procedure for issuance and enforcement of order of restitution

(a) For orders of restitution under this title, the court shall order the probation officer to obtain and include in its presentence report, or in a separate report, as the court may direct, information sufficient for the court to exercise its discretion in fashioning a restitution order. The report shall include, to the extent practicable, a complete accounting of the losses to each victim, any restitution owed pursuant to a plea agreement, and information relating to the economic circumstances of each defendant. If the number or identity of victims cannot be reasonably ascertained, or other circumstances exist that make this requirement clearly impracticable, the probation officer shall so inform the court.

(b) The court shall disclose to both the defendant and the attorney for the Government all portions of the presentence or other report pertaining to the matters described in subsection (a) of this section.

(c) The provisions of this chapter [18 USCS §§ 3661 et seq.], chapter 227 [18 USCS §§ 3551 et seq.], and Rule 32(c) of the Federal Rules of Criminal Procedure shall be the only rules applicable to proceedings under this section.

(d) (1) Upon the request of the probation officer, but not later than 60 days prior to the date initially set for sentencing, the attorney for the Government, after consulting, to the extent practicable, with all identified victims, shall promptly provide the probation officer

with a listing of the amounts subject to restitution.

(2) The probation officer shall, prior to submitting the presentence report under subsection (a), to the extent practicable--

(A) provide notice to all identified victims of--

(i) the offense or offenses of which the defendant was convicted;

(ii) the amounts subject to restitution submitted to the probation officer;

(iii) the opportunity of the victim to submit information to the probation officer concerning the amount of the victim's losses;

(iv) the scheduled date, time, and place of the sentencing hearing;

(v) the availability of a lien in favor of the victim pursuant to subsection (m)(1)(B); and

(vi) the opportunity of the victim to file with the probation officer a separate affidavit relating to the amount of the victim's losses subject to restitution; and

(B) provide the victim with an affidavit form to submit pursuant to subparagraph (A)(vi).

(3) Each defendant shall prepare and file with the probation officer an affidavit fully describing the financial resources of the defendant, including a complete listing of all assets owned or controlled by the defendant as of the date on which the defendant was arrested, the financial needs and earning ability of the defendant and the defendant's dependents, and such other information that the court requires relating to such other factors as the court deems appropriate.

(4) After reviewing the report of the probation officer, the court may require additional documentation or hear testimony. The privacy of any records filed, or testimony heard, pursuant to this section shall be maintained to the greatest extent possible, and such records may be filed or testimony heard in camera.

(5) If the victim's losses are not ascertainable by the date that is 10 days prior to sentencing, the attorney for the Government or the probation officer shall so inform the court, and the court shall set a date for the final determination of the victim's losses, not to exceed 90 days after sentencing. If the victim subsequently discovers further losses, the victim shall have 60 days after discovery of those losses in which to petition the court for an amended restitution order. Such order may be granted only upon a showing of good cause for the failure to include such losses in the initial claim for restitutionary relief.

(6) The court may refer any issue arising in connection with a proposed order of restitution to a magistrate judge or special master for proposed findings of fact and recommendations as to disposition, subject to a de novo determination of the issue by the court.

(e) Any dispute as to the proper amount or type of restitution shall be resolved by the court by the preponderance of the evidence. **The burden of demonstrating the amount of the loss sustained by a victim as a result of the offense shall be on the attorney for the Government.** The burden of

demonstrating the financial resources of the defendant and the financial needs of the defendant's dependents, shall be on the defendant. The burden of demonstrating such other matters as the court deems appropriate shall be upon the party designated by the court as justice requires... *Id.* (As amended Nov. 2, 2002, P.L. 107-273, Div B, Title IV, § 4002(e)(1), 116 Stat. 1810.) (emphasis added)

U.S.S.G. § 6A1.3 provides in relevant part:

Resolution of Disputed Factors (Policy Statement)

(a) When any factor important to the sentencing determination is reasonably in dispute, the parties shall be given an adequate opportunity to present information to the court regarding that factor. In resolving any dispute concerning a factor important to the sentencing determination, the court may consider relevant information without regard to its admissibility under the rules of evidence applicable at trial, provided that the information has sufficient indicia of reliability to support its probable accuracy.

(b) The court shall resolve disputed sentencing factors at a sentencing hearing in accordance with Rule 32(c)(1), Fed. R. Crim. P.

As amended effective November 1, 1987. Amended effective November 1, 1989 (see Appendix C, amendment 294); November 1, 1991 (see Appendix C, amendment 387); November 1, 1997 (see Appendix C,

amendment 574); November 1, 1998 (see Appendix C, amendment 586).